Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioner,

v.

VP BUILDINGS, INC.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: November 29, 2010

QUESTION PRESENTED

Most courts of appeals to have addressed the issue have concluded that a chapter 11 debtor is obligated to pay in full the necessary expenses of administering its chapter 11 case, including the full cost of the insurance that it purchases to cover tort claims arising from its operations in bankruptcy. *See, e.g., Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997). This Court has likewise concluded that "the cost of insurance against tort claims arising during [bankruptcy] is an administrative expense payable in full." *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968). The court below, however, reached a contrary conclusion, and the question presented is:

Whether a chapter 11 debtor is obligated to pay in full as an administrative expense the cost of necessary insurance that it purchases during the course of its chapter 11 case?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 14(b) and 29.6, Petitioner National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") makes the following disclosures:

1. National Union is a wholly-owned subsidiary of Chartis U.S., Inc. Chartis U.S., Inc. is a wholly-owned subsidiary of Chartis Inc. Chartis Inc. is a wholly-owned subsidiary of AIUH LLC. AIUH LLC is a wholly-owned subsidiary of American International Group, Inc., which is a publicly-owned corporation.

2. With the exception of the AIG Credit Facility Trust, a trust established for the sole benefit of the United States Treasury, no parent entity or publicly-held entity owns 10% or more of the stock of American International Group, Inc.

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PRELIMINARY STATEMENT

This matter arises out of the chapter 11 bankruptcy case of the LTV Corporation ("LTV") and certain of its subsidiaries and affiliates, including VP Buildings, Inc. ("VP Buildings") and four other VP entities (collectively, the "VP Debtors").[1] Under the Bankruptcy Code, a chapter 11 debtor is generally authorized to operate its business after commencing its bankruptcy case. 11 U.S.C. §§ 1101(1), 1107, 1108 (authorizing operation of business). An operating debtor will necessarily incur certain expenses, and in relevant part, the Code provides that the "actual, necessary costs" of operating the debtor's business in bankruptcy qualify as "administrative expenses" payable in full on a priority basis. *Id.* §§ 503(b), 507(a)(2); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4-5 (2000). This priority gives third parties an incentive to supply the debtor with necessary goods and services (including insurance) while the debtor seeks to reorganize. Indeed, as this Court has explained, administrative priority for the cost of insurance is necessary, "else insurance could not be obtained." *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968).

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[1] The VP Debtors are VP Buildings; United Panel, Inc.; Varco Prudent International, Inc.; VP-Graham, Inc.; and LTV Walbridge, Inc. Pet. App. 20a.

LTV and the VP Debtors commenced their chapter 11 cases in 2000. Thereafter, petitioner National Union Fire Insurance Company of Pittsburgh, PA ("National Union") supplied the VP Debtors with workers' compensation and other insurance[2] for tort claims that arose in 2001 during the course of their chapter 11 proceedings. At issue is whether the full cost of the workers' compensation portion of this insurance is properly payable as an administrative expense.

A business cannot operate in chapter 11 without complying with applicable workers' compensation regulations, which generally require an operating debtor to maintain adequate workers' compensation insurance coverage. *See* 28 U.S.C. § 959. Accordingly, the VP Debtors purchased workers' compensation insurance from National Union and agreed to pay National Union the full amount of the cost of this insurance.

Debtors in bankruptcy are often short on cash and therefore typically prefer to pay for their insurance over time. In this case, rather than pay a single, large, fixed, up-front premium of over $6 million for its insurance, LTV and its

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[2] For ease of reference, this Petition will refer to all such insurance as "workers' compensation insurance."

affiliates agreed to pay a much smaller, variable up-front premium of approximately $967,131, and agreed to pay the balance of the cost of their insurance (approximately $4,952,583) under the terms of a "deductible reimbursement" arrangement.[3] Under this common type of payment structure, the debtors' obligation to make payments extended into the future beyond the particular year (2001) for which they obtained coverage.

In 2003, after National Union had supplied its insurance coverage, but while the VP Debtors were still making their payments to National Union for this insurance, the VP Debtors confirmed their chapter 11 plan (the "Plan"). Under the Bankruptcy Code, a bankruptcy court cannot confirm a chapter 11 plan unless the plan provides for the payment in full of all administrative expenses. 11 U.S.C. § 1129(a)(9). Complying with this provision, the debtors' Plan provides that all administrative expenses will be paid in full, and appropriate reserves have been established for the full payment of administrative claims liquidated after confirmation. United States District Court Appendix ("USDC App.")

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[3] The term "deductible reimbursement" refers to LTV's and the VP Debtors' share of the cost of National Union's payment of workers' compensation benefits to injured employees.

II-A110, 118.[4] After the bankruptcy court confirmed their Plan, however, the VP Debtors objected to making further payment to National Union for their workers' compensation insurance, asserting that payments due post-confirmation (*i.e.*, after confirmation of their Plan) were not entitled to be treated as expenses of administration.

The bankruptcy court agreed, concluding that, after confirmation, it was no longer necessary for them to continue paying for the insurance they purchased as an expense of administration. Following a prior decision of the Sixth Circuit addressing the same question, *Zurich American Insurance Co. v. Lexington Coal Co., LLC (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008), the district court agreed with the bankruptcy court, as did a panel of the Sixth Circuit, concluding that it was also bound by *HNRC*. As two of the concurring circuit judges below observed, however, the decision in *HNRC* conflicts with authoritative decisions of other courts of appeals, is contrary to this Court's deci-

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[4] The term "USDC App." refers to the United States District Court Appendix that was filed by National Union in the United States District Court for the Northern District of Ohio (Eastern Division) in the proceedings below pursuant to that court's local rules. The USDC App. was filed on March 10, 2008 as an attachment to National Union's Opening Brief under District Court docket entry 16.

sion in *Reading*, and will have the disastrous effect of making workers' compensation insurance unavailable on extended payment terms in bankruptcy cases within the Sixth Circuit. Pet. App. 15a-18a. Specifically, no insurer will be willing to permit a chapter 11 debtor to pay for its insurance over time if, by simply confirming its chapter 11 plan, the debtor may eliminate its obligation to make its scheduled payments. Pet. App. 18a. Because the decision below following *HNRC* conflicts with the decisions of other courts of appeals, is contrary to this Court's decision in *Reading*, and addresses a vitally important question of bankruptcy law, certiorari is warranted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a, is reported at 606 F.3d 835. The opinion of the United States District Court for the Northern District of Ohio, Pet. App. 19a, is unpublished but is available at 2008 WL 4445075. The opinion of the United States Bankruptcy Court for the Northern District of Ohio, Pet. App. 30a, is unpublished.

JURISDICTION

The bankruptcy court possessed jurisdiction over the bankruptcy proceedings. 28 U.S.C. §§ 1334, 157. On December 21, 2007, the bank-

ruptcy court issued its order denying administrative expense status to that portion of National Union's claim representing the unpaid cost of National Union's insurance at the time the VP Debtors confirmed their chapter 11 Plan, Pet. App. 30a, and entered judgment on the same date. USDC App. I-A13. National Union timely appealed on December 31, 2007. USDC App. I-A14. The district court possessed jurisdiction over the appeal pursuant to 28 U.S.C. § 158. On September 29, 2008, the district court affirmed the Bankruptcy Court's judgment. Pet. App. 19a. On October 24, 2008, National Union timely appealed. Pet. App. 6a. The Sixth Circuit possessed jurisdiction pursuant to 28 U.S.C. §§ 1291, 158(d). On June 4, 2010, the Sixth Circuit affirmed and entered judgment on the same date. Pet. App. 1a. LTV's petition for rehearing en banc was denied on August 31, 2010. Pet. App. 48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Pursuant to Supreme Court Rule 14(f), the relevant provisions of 11 U.S.C. §§ 503 and 507(a)(2) are reprinted at Pet. App. 50a.

STATEMENT

For many years, National Union provided LTV and its subsidiaries (including the VP Debtors) with workers' compensation, automobile li-

ability, and general commercial liability insurance coverage. USDC App. I-A39. On December 29, 2000, LTV and the VP Debtors filed their respective bankruptcy petitions. USDC App. I-A55. During 2001, following the commencement of the bankruptcy proceedings, National Union continued to provide worker's compensation insurance to the VP Debtors. USDC App. I-A39, 44-48. Only the VP Debtors' obligations under the post-petition 2001 National Union policies (i.e., those in place after the filing of their bankruptcy cases) are at issue.

National Union's workers' compensation policies were "loss-sensitive," meaning that "the cost of most losses were to be reimbursed by LTV" and the VP Debtors, respectively. USDC App. I-A39. The way workers' compensation policies of this kind typically work, the insurer (here National Union) fronts the monthly payments that must be paid to employees injured on the job during the coverage period (here 2001), which payments often extend well into the future for the duration of the employees' disabilities. The insurer then bills the employer (here the VP Debtors) for the employer's share of these losses. Pursuant to the terms of the policies in this case,[5] the VP Debtors owed National Union for

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[5] The relevant payment terms are contained in three documents that work together as an integrated whole: (1) the Payment Agreement; (2) the Schedule of Policies and

amounts due both before and after they confirmed their Plan as reimbursement for the cost of National Union's payment of benefits to workers injured in 2001. Accordingly, National Union filed administrative expense claims against the VP Debtors for these obligations (and likewise for similar obligations owed by LTV and certain of its other affiliates). USDC App. II-A185, 189-91; USDC App. III-A255-318; USDC App. IV-A319-340, 411-12.

LTV and the VP Debtors responded by commencing an adversary proceeding challenging the administrative expense claims. Pet. App. 32a. The parties agreed to arbitrate the dispute, and in June 2004, the bankruptcy court entered an agreed order compelling arbitration. USDC App. IV-A413-17. The order provided that the arbitrators' award would establish the amount of National Union's post-petition claims as a fixed sum, and that the bankruptcy court would then decide whether National Union's post-petition claims would be afforded administrative expense status. USDC App. IV-A415.

The arbitrators found, *inter alia*, that National Union had a total post-petition claim against LTV and its affiliates for $2,494,498

Payment Obligations; and (3) the Large Risk Rating Plan Endorsement. USDC App. I-A39, 45-48; USDC App. II-A171-81, 192-212; USDC App. III-A213-217.

based solely on insurance issued for the post-petition policy year 2001. Pet. App. 33a; USDC App. I-A40-42. Pursuant to the relevant agreements, this amount consisted of deductible reimbursement obligations – benefits National Union paid to employees injured in 2001 for which LTV and its affiliates had not yet reimbursed National Union, reserves for benefits that National Union would pay to these injured employees in the future, and allocated expenses in paying benefits. USDC App. I-A40-42. National Union asserts that the VP Debtors' approximate share of this amount is $993,769. USDC App. I-A41. Following the liquidation by arbitration of the VP Debtors' obligation, National Union settled with LTV and all other LTV entities except the VP Debtors. USDC App. IV-A419.

After the arbitration liquidated the VP Debtors' post-petition obligation to National Union, the VP Debtors moved for summary judgment on the disputed portion of National Union's administrative expense claims (*i.e.*, the cost of National Union's payment to employees injured in 2001 for benefits liquidated and billed after confirmation of the Plan). The bankruptcy court granted the VP Debtors' motion, citing two reasons. First, the court held that the VP Debtors' bankruptcy estates ceased to exist upon confirmation of the Plan in 2003, concluding that any amounts due "that arise post-confirmation necessarily cannot satisfy the requirement that they

'preserve the estate' and would not be entitled to administrative expense status." Pet. App. 42a (quoting 11 U.S.C. § 503(b)).

Second, the bankruptcy court held that National Union sought payment for amounts "that have not yet arisen pursuant to the terms of its agreement with VP Debtors, because National Union itself has not paid the claims . . . National Union instead seeks payment of estimated claims that it may, or may not, have to pay at some future date." Pet. App. 42a. The bankruptcy court concluded that expenses that remained unliquidated at the time of plan confirmation were not "actual" and therefore not allowable. Pet. App. 42a, 47a. On appeal, the district court affirmed, following the intervening decision of the Sixth Circuit addressing the same general issue, *Zurich American Insurance Co. v. Lexington Coal Co., LLC (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008). Pet. App. 18a.

On June 4, 2010, a panel of the Sixth Circuit also affirmed, concluding that the cost of National Union's insurance was not "actual" because the unbilled, post-confirmation amounts would not become fixed until National Union made benefit payments to injured employees in the future and sought reimbursement from the VP Debtors. Pet. App. 10a-12a. In other words, rather than focus on whether National Union provided a benefit to the estate by supplying

valuable insurance coverage in 2001 while the VP Debtors were in bankruptcy, the Court below focused on *when* the payments for this insurance were supposed to be calculated and paid. Because the VP Debtors confirmed their Plan before they completed their payments, what otherwise would have been an "actual" expense without plan confirmation became one that was no longer "actual," and the VP Debtors were thereby excused from further payment.

In reaching its decision, the Court below explained that it was "bound by" the Sixth Circuit's prior decision in *HNRC*. Pet. App. 12a. In *HNRC*, the Sixth Circuit adopted the decision of a district court that held that insurance costs that a debtor incurs during its bankruptcy case are not properly administrative expenses to the extent the amount of the costs were not yet fixed at the time the debtor confirmed its chapter 11 plan. Pet. App. 8a-9a. In the instant case, Circuit Judge Cook wrote a concurrence, which Judge White joined, to "separately . . . question *HNRC*'s holding and to urge en banc review of the application of that rule to the present case." Pet. App. 13a (Cook, J., concurring).

As Judge Cook noted, "no party disputes that the debtor's survival as an operating entity required the insurance National Union provided." Pet. App. 14a (Cook, J., concurring). Nevertheless, "under *HNRC*'s holding, by sched-

uling prospective payments (some of which arise after plan confirmation), the debtor receives a windfall, avoiding the entire post-confirmation portion of the obligation." Pet. App. 14a (Cook, J., concurring). As Judge Cook explained, the rationale behind *HNRC* was that "such post-confirmation payments (unlike the pre-confirmation payments made on the same contract covering the same service) cannot qualify as actual, necessary, or a benefit to the estate by virtue of their post-confirmation nature." Pet. App. 14a (Cook, J., concurring). But as Judge Cook concluded, under applicable law as adopted by other courts of appeals, "the timing of the payments should not affect the analysis of whether the cost of the service can satisfy the criteria necessary to qualify for administrative priority." Pet. App. 14a-15a (Cook, J., concurring).

As Judge Cook noted, the courts of appeals have generally adopted one of two relevant "frameworks" for considering whether an obligation is entitled to administrative priority: "1) when the debtor obligates itself to pay or 2) when the service is rendered." Pet. App. 15a (Cook, J., concurring). As Judge Cook observed, National Union's claim qualifies for administrative expense status under either of these tests because National Union rendered its service (*i.e.*, supplied the necessary insurance coverage) in 2001 during the pendency of the VP Debtors' bank-

ruptcy case, and the VP Debtors contracted for this service during their case. Pet. App. 16a (Cook, J., concurring) ("Under either framework, National Union's claimed administrative expense qualifies – VP Debtors signed the insurance contract post-petition, incurring liability then, and acquired actual, not potential, insurance coverage."). Following *HNRC*, however, the Court below felt obliged to chart a different course, concluding that the time the "creditor bills the debtor for its services" is the dispositive test, and if this occurs after confirmation of the debtor's plan, the creditor is simply out of luck. Pet. App. 15a (Cook, J., concurring).

As Judge Cook noted, the *HNRC* standard turns on an evaluation of whether the *cost* of the creditor's goods and services was "necessary" because the cost provided a benefit to the bankruptcy estate at the time the cost is billed. Pet. App. 13a (Cook, J., concurring). But as Judge Cook explained, "a *cost* cannot be necessary to or benefit anyone, let alone a bankrupt estate," and "the better approach asks whether a creditor provided a necessary service for the estate's benefit and preservation during the debtor's bankruptcy proceeding . . . ." Pet. App. 16a (Cook, J., concurring).

As Judge Cook explained further, "[t]he Supreme Court held in *Reading* . . . that 'the cost of insurance against tort claims arising during

[bankruptcy] is an administrative expense payable in full . . . .'" Pet. App. 16a (Cook, J., concurring). And as Judge Cook noted, "[t]he *HNRC* decision fails to adequately account for this clear and controlling statement of law." Pet. App. 17a (Cook, J., concurring). Although the VP Debtors argued that *Reading* applies only to "insurance premium[s] . . . (and that this case implicates only loss-sensitive deductible reimbursement payments)," Judge Cook observed that this is "a distinction without difference" because "[a]ll agree that the post-confirmation insurance payments at issue represent part of the price of the insurance." Pet. App. 17a (Cook, J., concurring). Judge Cook further reasoned that, "[i]f instead of insurance this case involved the purchase of raw materials for steel that the debtor, a steel producer, needed to fulfill an order, and managed to purchase on similar terms, no one would seriously contend that because the payments were slated to occur post-confirmation the steel was not necessary to preserve the estate." Pet. App. 17a (Cook, J., concurring).

In conclusion, Judge Cook observed: "The *HNRC* decision will, as National Union warns, likely spell an end to the availability of extended payment terms for insurance in the bankruptcy setting." Pet. App. 18a (Cook, J., concurring). Accordingly, she urged that "[t]he full court should use this case to take another look at *HNRC*." Pet. App. 18a (Cook, J., concurring). In

spite of Judge Cook's appeal, however, the Court below denied National Union's subsequent petition for rehearing en banc, and this petition followed. Pet. App. 48a (Cook, J., concurring).

REASONS FOR GRANTING THE WRIT

Chapter 11 debtors frequently arrange to purchase on credit the goods and services they need to operate during the course of their bankruptcy cases, and correspondingly arrange to pay for these goods and services over time. The Bankruptcy Code specifically authorizes this, 11 U.S.C. § 363(c)(1), and the prospect of payment on a priority "administrative expense" basis encourages creditors to agree to these kinds of credit terms. To this end, section 503(b)(1)(A) of the Bankruptcy Code provides that priority administrative expenses include "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A).

In order to qualify as an "actual, necessary" cost of "preserving the estate," most courts of appeals look to see if the particular expense is one incurred in connection with a transaction by the chapter 11 debtor on behalf of its bankruptcy estate, and whether the particular goods and services that the creditor supplied provided a tangible benefit to the estate. If so, the associated cost is entitled to administrative expense priority. In this case, there is no question that

National Union supplied vital insurance coverage pursuant to a transaction with the VP Debtors on behalf of their bankruptcy estates during the course of their bankruptcy cases and did so for the benefit of their estates. Plainly, without National Union's insurance, the VP Debtors would not have been able to operate. The only question that the Court below addressed was whether a portion of the *cost* of this insurance consisting of amounts National Union would bill after the VP Debtors confirmed their chapter 11 Plan qualifies as an "actual, necessary" expense.

Applying the standard analysis under section 503, most courts of appeals would conclude that the full cost of National Union's insurance coverage would qualify as an administrative expense because (1) it involved a transaction with the chapter 11 VP Debtors, and (2) the insurance coverage provided a necessary benefit. *See, e.g., Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997). Following *HNRC*, however, the Court below concluded that the portion of the cost of this insurance unbilled at the time of confirmation of the VP Debtors' Plan did not qualify because this cost was not yet "actual" at the time of confirmation and, thus, did not supply a benefit. Pet. App. 10a-12a. Of course, the price a debtor must pay for something is never a benefit to the debtor or its estate; it is the goods or services that the debtor receives (*e.g.*, insurance) in exchange for the cost

that supplies the benefit. Thus, by insisting that the cost of the insurance provide a benefit rather than the insurance itself, the Court below established a standard that can never be met. Nonetheless, as the concurrence pointed out, that is what the Court below concluded.

This approach conflicts with the standard other courts of appeals have adopted and applied. It likewise conflicts with the decision of this Court in *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968). As this Court stated in *Reading*, "'actual and necessary costs' should include costs ordinarily incident to operation of a business," and added that the full cost of insurance should also be included. *Id.; see also Texas Comptroller of Pub. Accounts v. Megafoods Stores, Inc. (In re Megafoods Stores, Inc.)*, 163 F.3d 1063, 1071-72 (9th Cir. 1998); *Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 437-38 (5th Cir. 1998); *Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection*, 116 F.3d 16, 19-21 (1st Cir. 1997); *Al Copeland Enters., Inc. v. Texas (In re Al Copeland Enters., Inc.)*, 991 F.2d 233, 239-40 (5th Cir. 1993); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976). The decision below cannot be reconciled with this approach.

Moreover, as the concurrence in this case also pointed out, the decision below is likely to have gravely negative consequences for the administration of chapter 11 cases by rendering unavailable insurance coverage on extended payment terms. Finally, this case presents an appropriate vehicle to resolve the question presented because the issue is raised squarely and is outcome-determinative. For these reasons, certiorari is warranted.

A. The Decision Below Conflicts with the Decisions of Other Courts of Appeals.

Section 503(b)(1)(A) of the Bankruptcy Code provides that administrative expenses include "the actual, necessary costs and expenses of preserving the estate" and sets forth a nonexclusive list of allowable expenses. 11 U.S.C. § 503(b); *Einstein/Noah Bagel Corp. v. Smith (In re BCE West, L.P.)*, 319 F.3d 1166, 1172 (9th Cir. 2003). Administrative expenses "are, as a rule, entitled to priority over prepetition unsecured claims." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 4-5 (2000) (citing 11 U.S.C. §§ 507(a)(1), 726(a)(1), 1129(a)(9)(A)).

To be deemed an "actual, necessary" administrative expense, a debt must (1) arise from a transaction with the bankruptcy estate, and (2) directly and substantially benefit the estate.

Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 816 (6th Cir. 1997); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976). This two-part test is "essentially an effort to determine whether the underlying statutory purpose will be furthered by granting priority to the claim in question, and [courts should] apply it in that spirit." *In re Jartran, Inc.*, 732 F.2d 584, 587 (7th Cir. 1984). Indeed, "application of [administrative expense priority] to Chapter [11] arrangements is primarily a means of implementing the statutory objective of facilitating the rehabilitation of insolvent businesses." *Mammoth Mart*, 536 F.2d at 954;[6] *accord Boeing N. Am., Inc. v. Ybarra (In re Ybarra)*, 424 F.3d 1018, 1026 (9th Cir. 2005) ("The purpose of administrative priority status is to encourage third parties to contract with the bankruptcy estate for the benefit of the estate as a whole"); *Mass. Div. of Employment & Training v. Boston Reg'l Med. Ctr., Inc. (In re Boston Reg'l Med. Ctr., Inc.)*, 291 F.3d 111, 124 (1st Cir. 2002)

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[6] In *Mammoth Mart*, the court discussed section 64(a)(1) of the Bankruptcy Act, 11 U.S.C. § 104(a)(1). 536 F.3d at 952, 954. Section 64(a)(1) is the predecessor to section 503(b)(1)(A), and the same administrative expense priority analysis applies to both statutes because the relevant statutory provision was left "essentially unchanged." *Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 437 (5th Cir. 1998); *see also Jartran*, 732 F.2d at 586.

("the administrative priority is necessary to induce potential contractors to do business with the debtor-in-possession, which in turn is necessary to prevent the business from collapsing entirely with the filing"); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1453-54 (11th Cir. 1992) ("Obviously, without a guarantee of first-priority payment, third parties would not deal with a business in chapter 11 reorganization, and the goal of rehabilitation could not be achieved."); *Jartran*, 732 F.2d at 586 ("If a reorganization is to succeed, creditors asked to extend credit after the petition is filed must be given priority so they will be moved to furnish the necessary credit to enable the bankrupt to function.").

It is unquestioned that National Union's claim in this case arose from a transaction with the bankruptcy estate. The VP Debtors have argued, however, that the relevant unpaid cost of the insurance that they purchased in 2001 – the deductible reimbursement portion consisting of National Union's payment of benefits to employees injured in 2001 and unbilled at the time of confirmation of their Plan – is not an "actual" expense because the amount was not fixed at the time of confirmation, but would depend on the actual amount of benefits paid. The Court below agreed, concluding that it was bound by its prior decision in *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 536 F.3d 683

(6th Cir. 2008). Pet. App. 12a. But the fact that the VP Debtors were obligated to pay their deductible obligation over time, and that the precise amount of the payments were subject to change, does not make the post-confirmation obligation any less "actual" – it simply makes it "unliquidated." *See* Pet. App. 14a (Cook, J., concurring) ("the timing of the payments should not affect the analysis of whether the cost of the service can satisfy the criteria necessary to qualify for administrative priority.").

Section 503(b) does not require that, in order to be "actual," the administrative expense claim must be "liquidated" at a particular point in time. Indeed, section 101(5) of the Bankruptcy Code provides that a "claim" includes any right to payment regardless of whether it is "liquidated" or "unliquidated." 11 U.S.C. § 101(5). It is therefore not surprising that other courts of appeals, in contrast to the decision below, have concluded that unliquidated amounts can properly constitute an administrative expense. *E.g.*, *Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997) (concluding that the full cost of workers' compensation insurance is properly an administrative expense); *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 934 (1st Cir. 1993); *cf. Advanced Telecomm. Network, Inc. v. Allen (In re Advanced Telecomm. Network, Inc.)*, 490 F.3d 1325, 1335 (11th Cir. 2007). In-

deed, *Hemingway* explicitly approved the estimation of administrative expenses. 993 F.2d at 934.

As the concurrence below pointed out, the relevant standard adopted by other courts of appeals "focus[es] not on when a creditor bills the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered." Pet. App. 15a (Cook, J., concurring). Although the concurrence noted that National Union's claimed administrative expense would qualify under either version of this analysis, the Court below felt constrained by *HNRC* to follow a different path.

As Judge Cook's concurrence below further observed, the decision below fundamentally parts company with the decisions of other courts of appeals by focusing "on whether the [insurer's] claim itself – a cost – provided an actual and necessary benefit to the estate." Pet. App. 13a (Cook, J., concurring) (citing *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008)). As Judge Cook reasoned, "framed this way, there can be just one answer – a *cost* incurred by a business (let alone a bankrupt one) by definition provides no benefits and, arguably, does not become actual or necessary until the debtor receives the bill, which may not occur until after plan confirmation." Pet. App. 13a-14a (Cook, J., concur-

ring). This is contrary to the clear weight of authority. As the concurrence explained, "[o]nly by analyzing the cost's purpose – assessing the *services* provided in exchange – can courts determine whether the expense meets § 503(b)'s requirements." Pet. App. 14a (Cook, J., concurring). Indeed, "given that a *cost* cannot be necessary to or benefit anyone, let alone a bankrupt estate, the better approach asks whether a creditor provided a necessary service for the estate's benefit and preservation during the debtor's bankruptcy proceedings, not whether the creditor billed the debtor for those services during that time." Pet. App. 16a (Cook, J., concurring).

Other courts of appeals, of course, have followed the "better approach," focusing on whether the *consideration* an estate receives in exchange for its obligation to pay (here, insurance coverage) confers a benefit, not whether the estate's *payment* does so. *E.g., Supplee v. Bethlehem Steel Corp (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007) ("[A]n expense is administrative only if it arises out of a transaction between the creditor and the bankrupt's trustee or debtor in possession, and only to the extent that the *consideration supporting the claimant's right to payment* was both supplied to and beneficial to the debtor-in-possession in the operation of the business.") (emphasis supplied); *CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d

229, 237 (4th Cir. 2005) ("[C]ourts agree that an administrative expense has two defining characteristics," including "the *consideration supporting the right to payment* provides some benefit to the estate.") (emphasis supplied); *Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988) (describing consideration as "crucial" to the right to administrative expense priority); *Mammoth Mart*, 536 F.2d at 954 ("the case law teaches that a creditor's right to payment will be afforded [administrative expense] priority only to the extent that the *consideration* supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.") (emphasis supplied).

These decisions illustrate that, in conflict with the position taken by the Court below, the cost itself need not separately confer a benefit to the estate. Because the courts of appeals are divided over the correct standard of law to be applied in cases of this kind, certiorari is warranted.

B. The Decision Below Conflicts with a Prior Precedent of this Court.

In 1968, this Court decided *Reading Company v. Brown*, 391 U.S. 471 (1968), an administrative expense priority case involving the predecessor to section 503(b): section 64(a)(1) of the

former Bankruptcy Act, 11 U.S.C. § 104(a)(1). In *Reading*, the bankruptcy court appointed a receiver to conduct the debtor's business of leasing an eight-story building in Philadelphia. 391 U.S. at 473. A fire destroyed the building, together with the real and personal property of petitioner Reading and others. *Id.*

Reading filed an administrative expenses claim based on the asserted negligence of the receiver. *Id.* The trustee objected, arguing that the Court should read the term "necessary" narrowly such that priority "should be given only to those expenditures without which the insolvent business could not be carried on." *Id.* at 477. In response, the Court examined the purposes of section 64(a), chapter XI, and the Bankruptcy Act as a whole to determine whether the receiver's negligence gave rise to an "actual and necessary" cost of operating the debtor's business. *Id.* at 476.

The Court declined to read the statutory term narrowly, stating that "[i]n our view the trustee has overlooked one important, and here decisive, statutory objective: fairness to all persons having claims against an insolvent." *Id.* at 477. The Court reasoned that "the question is whether the fire claimants should be subordinated to, should share equally with, or should collect ahead of [existing] creditors," *id.* at 478, stating that "[e]xisting creditors are, to be sure,

in a dilemma not of their own making, but there is no obvious reason why they should be allowed to attempt to escape that dilemma at the risk of imposing it on others equally innocent," *id.* at 482-83.

The Court then turned to the question of insurance, stating that "the cost of insurance against tort claims arising during an arrangement is an administrative expense payable in full under § 64a(1) before dividends to general creditors." *Id.* at 483. The Court reasoned, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained; and if a receiver or debtor in possession is to be encouraged to obtain insurance in adequate amounts, the claims against which insurance is obtained should be potentially payable in full." *Id.* The Court added that analogous cases suggest that "'actual and necessary costs' should include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible." *Id.* The Court then held that "damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to 'actual and necessary costs' of a Chapter [11] arrangement." *Id.* at 485.

Several courts of appeals have concluded that *Reading* survived enactment of the current Bankruptcy Code. *Total Minatome Corp. v.*

Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.), 258 F.3d 385, 388 (5th Cir. 2001); *Al Copeland Enters., Inc. v. Texas (In re Al Copeland Enters., Inc.)*, 991 F.2d 233, 239 (5th Cir. 1993), and that its rationale likewise applies to cases beyond the tort context, *Texas Comptroller of Pub. Accounts v. Megafoods Stores, Inc. (In re Megafoods Stores, Inc.)*, 163 F.3d 1063, 1071 (9th Cir. 1998). For example, courts have applied it to "situation[s] in which a bankruptcy estate may engage in activities regulated by state law while [attempting to avoid] the costs associated with that regulation," *Mass. Div. of Employment & Training v. Boston Reg'l Med. Ctr., Inc. (In re Boston Reg'l Med. Ctr., Inc.)*, 291 F.3d 111, 126 (1st Cir. 2002), or where "damage to the plaintiffs was caused by the postpetition operation of the estate's business." *Megafoods*, 163 F.3d at 1072 (holding that statutory interest was administrative expense) (citation & internal quotation marks omitted); *see also, e.g., Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 436 (5th Cir. 1998) (holding that costs incurred by the state in satisfaction of estate's post-petition environmental obligations were entitled to administrative expense priority); *Cumberland Farms v. Florida Dep't of Envtl. Protection*, 116 F.3d 16, 21 (1st Cir. 1997) ("This was a postpetition claim incurred during the operation of Cumberland Farms' business while it was operating under Chapter 11. We think it would be fundamentally unfair to allow Cumberland Farms to flout Flor-

ida's environmental protection laws and escape paying a penalty for such behavior."); *Copeland*, 991 F.2d at 240 (holding that statutory award of interest constituted an administrative expense) ("Copeland . . . elected not to carry out its statutory obligations under Texas law in a prompt manner. This post-petition decision on the part of Copeland resulted in monetary harm to the State . . . and resulted in Copeland's estate incurring a statutory award of interest."); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.)*, 963 F.2d 1449, 1458 (11th Cir. 1992) ("We find that a policy of ensuring compliance by trustees with state law is sufficient justification to place civil penalties assessed for postpetition mining operations in the category of 'some cases' in which 'costs ordinarily incident to operating of a business' are accorded administrative expense priority.") (citation omitted); *Spunt v. Charlesbank Laundry (In re Charlesbank Laundry)*, 755 F.2d 200, 203 (1st Cir. 1985) (holding civil fine qualified for administrative expense priority because "[t]he debtor in this case *deliberately* continued a violation of law month after month presumably because it was more lucrative for the business to operate outside the zoning ordinance than within it."); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 955 (1st Cir. 1976) ("When the debtor-in-possession . . . accepts services from a third party without paying for them, the debtor-in-possession itself caused legally

cognizable injury, and the resulting claims for compensation are entitled to first priority.").

In the circumstances of this case, the relevant administrative expense – National Union's claim for unpaid deductible reimbursements – involves the cost of insurance *that applicable state law requires* a debtor to have in order to operate, which requirement applies in chapter 11 proceedings, 28 U.S.C. § 959(b).[7] The VP Debtors' attempt to avoid paying the full cost of the insurance that was necessary in order for them to reorganize is, at bottom, an effort to avoid

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[7] Almost every state requires businesses to carry workers' compensation insurance or prove their financial ability to pay all workers' compensation claims that may arise. The vast majority of the states where the VP Debtors did business so required. *See* USDC App. IV-A390 (listing locations in, among other places, Alabama, Arkansas, California, Missouri, North Carolina, Tennessee, and Wisconsin)); *see also* Mo. Rev. Stat. § 287.128.7 (knowing failure to carry workers' compensation insurance is a misdemeanor); Ark. Code Ann. § 11-9-404(a) (every employer must carry workers' compensation insurance or prove to regulators a financial ability to pay); Ala. Code § 25-5-8 (similar); Cal. Labor Code § 3700 (similar); N.C. Gen. Stat. § 97-93(a) (similar); Tenn. Code Ann. § 50-6-405(a) (similar); Wis. Stat. § 102.28(2)(a) (similar)). The VP Debtors also did business in Ohio and Texas. USDC App. IV-A390. In Ohio, workers' compensation must be insured through a state fund, and in Texas, the workers' compensation system is optional. *See* Ohio Rev. Code Ann. § 4123.35; Tex. Lab. Code Ann. § 406.002.

paying the cost of complying with applicable regulatory obligations.

Applying the rationale of *Reading*, courts have concluded that the proper focus is whether a particular expense is necessary to continued, post-petition operation of the insolvent business, because "the conceptual justification for administrative expense priority [is] that creditors must pay for those expenses necessary to produce the distribution to which they are entitled." *H.L.S.*, 151 F.3d at 437. Accordingly, although the trustee argued in *H.L.S.* that the costs incurred by Texas in conjunction with plugging unproductive wells did not "benefit" the estate, the Fifth Circuit disagreed, noting that "this is true – in the sense that the bankrupt estate and its creditors would have been happy to abandon the unproductive wells, leaving them unplugged in abdication of HLS's obligations under Texas law." *Id.* at 438. But, according to the court, "bearing in mind that the 'benefit' requirement is simply a gloss on the underlying concept of what is 'necessary,' our notion of 'benefit' cannot be limited to the narrow sense that the trustee urge[d]." *Id.; see also Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997) (holding that an insurer was entitled to administrative priority for its claim for postpetition workers' compensation premiums) ("There can be no doubt that continuing workers' compensation insurance is essential to preserving the estate of

a Chapter 11 debtor in possession. Under state law, MEI could not have remained in business without maintaining workers' compensation insurance or investing in a regulated program of self insurance."); *N.P. Mining*, 963 F.2d at 1458 ("when a trustee or debtor in possession operates a bankruptcy estate, compliance with state law should be considered an administrative expense. Otherwise, the bankruptcy estate would have an unfair advantage over nonbankruptcy competitors. A mining operation could, under the protection of chapter 11, cut costs by ignoring safety and environmental violations.").

All of these cases follow *Reading*, and in doing so have "attempted to avoid a situation in which a bankruptcy estate may engage in activities regulated by state law while avoiding the costs associated with that regulation." *Boston Reg'l*, 291 F.3d at 126. In contrast, the decision below lets the VP Debtors' estates keep the benefit, but avoid the burden, of the insurance that National Union supplied. It leaves National Union obligated to pay benefits to employees injured in 2001, but with no way to obtain the very reimbursement from the VP Debtors that the VP Debtors agreed to pay. Certiorari is warranted because the decision below contravenes both the letter and the spirit of *Reading*.

C. The Decision Below Involves a Question of Exceptional Importance.

The decision below, left standing, will have gravely negative consequences for chapter 11 reorganizations. It creates a loophole allowing a debtor in bankruptcy to avoid paying for necessary insurance purchased during the course of its bankruptcy proceeding by the simple expedient of confirming its plan before a creditor submits its bill or otherwise liquidates its claim. Applied in other contexts, the rationale of the decision below would permit a debtor to escape environmental obligations that it incurred during the course of its reorganization proceedings by confirming its plan prior to the liquidation of its environmental liabilities. It would similarly permit a debtor to escape tort, tax, and contractual liabilities. As Judge Cook explained below, this result is best described as a "windfall." Pet. App. 14a (Cook, J., concurring).

Under such conditions, no insurer will be willing to provide insurance to a bankrupt debtor on extended payment terms. *See* Pet. App. 18a (Cook, J., concurring) ("The *HNRC* decision [and the majority decision below] will, as National Union warns, likely spell an end to the availability of extended payment terms for insurance in the bankruptcy setting."). This can only hurt cash-strapped debtors seeking to reorganize, because insisting on full, up-front payment would

create an up-front drain on the debtor's scarce resources, putting debtors in bankruptcy at a competitive disadvantage with businesses outside of bankruptcy that can obtain insurance on credit. Such an outcome is contrary to the key rehabilitative policy of chapter 11 and section 503(b). *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984) ("the policy of Chapter 11 is to permit successful rehabilitation of debtors").

Finally, this case presents an appropriate vehicle for the Court to address the question presented. Resolution of the split of authority among the courts of appeals is not likely to be resolved absent intervention by this Court. The Sixth Circuit's position is firmly entrenched: in the decision below, it reaffirmed its initial decision in *HNRC* and denied en banc consideration. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 29, 2010

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED JUNE 4, 2010

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 10a0159p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL UNION FIRE INSURANCE CO., *Appellant,*

v.

VP BUILDINGS, INC., *Appellee.*

No. 08-4537

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 08-00196—Donald C. Nugent, District Judge.

Argued: December 4, 2009

Decided and Filed: June 4, 2010

Before: KENNEDY, COOK, and WHITE, Circuit Judges.

Appendix A

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KENNEDY, J., delivered the opinion of the court, in which COOK and WHITE, JJ., joined. COOK, J. (pp. 8-11), delivered a separate concurring opinion in which WHITE, J., joined.

OPINION

CORNELIA G. KENNEDY, Circuit Judge. National Union Fire Insurance Company ("National Union") appeals the district court's affirmance of the bankruptcy court's decision disallowing National Union's petition for administrative expenses. National Union provided the estate with workers' compensation insurance, and asks that the estate's contractual obligation to reimburse it for certain anticipated payments be granted administrative expense priority. Both the bankruptcy court and the district court rejected this argument, finding that the claim was not "actual" and did not benefit the estate. Because this case is controlled by our decision in *In re HNRC Dissolution Co.*, 536 F.3d 683 (6th Cir. 2008), we **AFFIRM**.

Appendix A

I. FACTUAL AND PROCEDURAL BACKGROUND

LTV Steel Company, Inc. and its subsidiaries filed voluntary petitions for Chapter 11 bankruptcy on December 29, 2000. LTV's subsidiaries include VP Buildings, Inc., United Panel, Inc., Varco Pruden International, Inc., VP-Graham, Inc., and LTV-Walbridge, Inc., collectively the "VP debtors."

The parties agree that National Union provided the LTV entities, including VP debtors, with workers' compensation insurance during calendar year 2001. This insurance, mandated by state law, guarantees that injured workers will be compensated in a timely manner regardless of the financial health of the employer. When an injury occurs in a covered year (such as 2001), National Union's insurance coverage is implicated. However, the actual payments to an injured employee are often required for years, or even decades, after the covered year.

The parties agree that under the terms of this agreement, which was entered into post-petition for post-petition activities and incorporates an earlier agreement, LTV and the VP Debtors are ultimately responsible for any workers' compensation claim that is incurred in 2001, regardless of when the benefits are actually paid

(subject to certain limits not at issue). When a workers' compensation claim matures for an injury that occurred in 2001, the parties' contract requires National Union to pay the entirety of the claim and seek reimbursement from the VP Debtors. This obligation of the VP Debtors is described in the contract as "deductible loss reimbursements," and defined as "the portion of any *Loss* and *ALAE* [Allocated Loss Adjustment Expense] [National Union] pay[s] that [VP Debtors] must reimburse [National Union] for under any 'Deductible' or 'Loss Reimbursement' provisions of a *Policy*." The contract makes it clear that the VP Debtor's "Payment Obligation" means "the amounts that [VP Debtors] must pay [National Union]", and includes "any portions thereof not yet due and payable [of] *Deductible Loss Reimbursements...*" In return for National Union advancing this money, National Union charged LTV a premium (which was paid) and obtained collateral.

Employees were injured in 2001, imposing an obligation on National Union to pay out future benefits. National Union asked that the reimbursement of this obligation for payments that are not due until after the closure of the bankruptcy estate be given administrative priority status. Because the injured employees' claims are ongoing in nature, there is uncertainty as to the amount that National Union will ultimately

pay. The parties agreed to arbitrate the amount of National Union's claim. The arbitration panel concluded that National Union's reimbursement claim for all LTV entities is valued at $2,494,498 for 2001. The arbitration award did not allocate liability to the various subsidiaries. Teresita Miranda, a manager with American International Companies, submitted an unsigned declaration that asserts, based on her review of the records, $993,769 is the amount that is attributable to the VP Debtors. The VP Debtors dispute this figure. The "[c]onfidential source data" supporting Miranda's conclusion has not been provided to the court.

The bankruptcy plan to liquidate the VP Debtors' assets and dissolve the estates was confirmed by order of the bankruptcy court on December 17, 2003. The bankruptcy court denied National Union's claim for administrative expense priority on December 21, 2007. The court concluded that the expense was not "actual" because National Union had not yet paid the benefits for the years after the closure of the bankruptcy estate. Moreover, the bankruptcy court found that reimbursement of the payments would not benefit the estate. National Union appealed, elected to have the case heard by the district court rather than the BAP, and the district court affirmed the bankruptcy court on Septem-

ber 29, 2008. National Union filed a timely notice of appeal.

II. DISCUSSION

"We review the bankruptcy court's decision directly, according no deference to the district court. The bankruptcy court's findings of fact are reviewed for clear error, and questions of law are reviewed de novo." *Phar-Mor, Inc. v. McKesson Corp.*, 534 F.3d 502, 504 (6th Cir. 2008) (quoting *In re S. Air Transp., Inc.*, 511 F.3d 526, 530 (6th Cir. 2007)).

The bankruptcy code provides that administrative expenses, "the actual, necessary costs and expenses of preserving the estate," 11 U.S.C. § 503(b)(1)(A), "are, as a rule, entitled to priority over prepetition unsecured claims," *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000) (citing 11 U.S.C. §§ 507(a)(1), 726(a)(1), 1129(a)(9)(A)). "The purpose of [this priority] is to facilitate the rehabilitation of insolvent businesses by encouraging third parties to provide those businesses with necessary goods and services." *In re United Trucking Service, Inc.*, 851 F.2d 159, 161 (6th Cir. 1988) (citing *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976)). However, "[c]laims for administrative expenses under § 503(b) are strictly construed because priority claims reduce the funds

available for creditors and other claimants." *In re Federated Dept. Stores, Inc.*, 270 F.3d 994, 1000 (6th Cir. 2001). "'[A] debt qualifies as an 'actual, necessary' administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate.'" *In re Eagle-Picher Industries, Inc.*, 447 F.3d 461, 464 (6th Cir. 2006) (quoting *Pension Benefit Guar. Corp. v. Sunarhauserman, Inc.* (*In re Sunarhauserman, Inc.*), 126 F.3d 811, 816 (6th Cir. 1997)). The party seeking the priority "has the burden of proving that his claim constitutes an administrative expense." *McMillan v. LTV Steel, Inc.*, 555 F.3d 218, 226 (6th Cir. 2009) (citing *In re White Motor Corp.*, 831 F.2d 106, 110 (6th Cir. 1987)).

The parties agree that the provision of insurance benefitted the estate, and that the transaction was entered into post-petition. However, the parties dispute whether the claim is "actual" under the meaning of the Bankruptcy Code and whether National Union's claim for reimbursement benefitted the estate.

We do not decide this case without precedent. In a published opinion, we recently adopted the reasoning of a district court that rejected the claimant's arguments:

To that effect, the narrow application of § 503(b)(1)(A) is rather unambiguous on its face: the claimed expense must have been an "actual" cost that is "necessary" to the "preservation" of the estate. *See In re Patch Graphics,* 58 B.R. at 745 (citing *In re Club Dev. & Mgmt. Corp.*, 27 B.R. 610, 612 (9th Cir. BAP 1982)) ("An administrative expense may not be allowed absent a finding that the expense is necessary for preserving the estate."). It is in this regard that Zurich's claim fails as a simple matter of statutory interpretation on both fronts: the claimed expenses are not "actual" (i.e., not yet realized) and the payment thereof, when the obligations are realized, cannot act to preserve an estate that no longer exists. At the moment Zurich's Claim was filed on the bar date for administrative expense claims, the ultimate loss projection for the deductible obligations was entirely speculative by nature and prospective by definition.

Nevertheless, despite LCC's subtle mention otherwise, there can be no question that Zurich will be forced to "advance" a substantial portion, if not all, of the deductible obligations in question. A key consideration, however,

> is the reality that Zurich is only contractually obligated to pay the deductibles, and subsequently seek reimbursement, once the claims actually "arise." Zurich contends that "arise" in this context should be viewed from a more macro perspective, effectively arguing that, even though the legal obligation to pay the expenses will not accrue until sometime in the future, the underlying event giving rise to the future claim (e.g., an employee's initial injury) necessarily occurred during the bankruptcy administration. In other words, Zurich asserts that the accrual of the claims should essentially relate back to the underlying insurance coverage as part and parcel of the relevant insurance policies, which include the premium obligations that were assigned administrative priority and satisfied accordingly. But Zurich does not, and cannot, provide any direct authority to support the contention that expenses necessarily realized post-confirmation can legally be characterized as "actual" under the Code.

In re HNRC Dissolution Co., 371 B.R. 210, 225-26 (E.D. Ky. 2007) (footnotes omitted), *aff'd*, 536 F.3d 683 (6th Cir. 2008) (per curiam), *cert. de-*

nied, 129 S. Ct. 2866 (2009).[1] Following this logic, National Union's claim will not be "actual" until it has made a payment and seeks reimbursement from the insured, which will typically occur years post-confirmation.

National Union argues that *HNRC* is distinguishable on several factual grounds, but none of the offered differences are material. First, National Union observes that the claimant in *HNRC* had only estimated the future indebtedness through a "report prepared by actuaries." *See id.* at 211. In contrast, National Union has, through arbitration, reduced its future indebtedness to all LTV entities to a specific figure by which all parties are bound. With some of the uncertainty of naked actuarial estimation reduced by reason of arbitration to which each side is bound, National Union posits, the claim is more "actual" here than in *HNRC*. The arbitration process may have tested the parties' actuarial estimates, but it did not change the nature of

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[1] Appellee brings to our attention that the Supreme Court denied certiorari in the *HNRC* case. We note this fact but afford it no weight because the denial of certiorari provides no guidance to this court, except to leave in place *HNRC* as binding law in this circuit. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

the claim to an "actual" total due by the debtors during the pendency of the bankruptcy estate. Under the terms of National Union's contract, the need for reimbursement only arises when payments are made. Until the payments are due, they are "not yet realized." *See id.* at 225. And under the reasoning of *HNRC*, it is only then that the claim becomes "actual."

Next, National Union argues that its claim can be paid under the provisions of the debtor's plan here because the plan creates a priority claims trust account from which administrative claims that are "not allowed as of the Effective Date" of the plan may be paid. However, it does not argue or point to any evidence that this was not the case in *HNRC* or how this transforms the claim to actual.

National Union further contends that the contractual language requiring reimbursement is different. In this case, the language of VP's contract provides that the payment obligation includes future deductible loss reimbursements that are not yet due. In *HNRC*, the insurance contract also required reimbursement of certain deductible amounts as they were incurred.[2] We

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[2] The appellant submits these documents along with a motion for the court to take judicial notice. The

can discern no meaningful distinction between the language of the two contracts.

The claimant also argues that *HNRC* was wrongly decided and conflicts with the Supreme Court's decision in *Reading Co. v. Brown*, 391 U.S. 471 (1968). Because we are bound by the prior panel's decision, we do not consider these arguments further. *See* 6 Cir. R. 206 ("Reported panel opinions are binding on subsequent panels."); *see also, e.g., Valentine v. Francis*, 270 F.3d 1032, 1035 (6th Cir. 2001). There are two exceptions to this rule: an intervening Supreme Court decision, or the prior decision is overruled en banc. Neither exception applies to this case.

We are bound by *HNRC* to conclude that National Union's request for reimbursement is not an "actual" expense within the meaning of the bankruptcy code. In light of this conclusion, we do not address whether the reimbursement benefitted the estate or otherwise qualified for administrative expense priority.

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motion was unopposed. We can take judicial notice of the factual record that provides the basis for a court's judgment. *See Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir. 1980). We grant the motion and consider the factual record as attached to the motion.

III. CONCLUSION

Because the arguments raised by appellant are foreclosed by our decision in *HNRC*, we **AFFIRM**.

CONCURRENCE

COOK, Circuit Judge. Constrained by the rule announced in *HNRC*, I concur in the majority opinion. I write separately to question *HNRC*'s holding and to urge en banc review of the application of that rule to the present case.

HNRC holds that post-confirmation claims for deductible reimbursements by an insurance company fail to qualify as actual and necessary expenses that benefit the estate, and thus cannot attain administrative expense priority as a matter of law. The *HNRC* panel[1] focused on whether the claim itself—a cost—provided an actual and necessary benefit to the estate. But framed this

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[1] The panel published an adopt-and-affirm opinion. *See In re HNRC Dissolution Co.*, 536 F.3d 683 (6th Cir. 2008) (adopting 371 B.R. 210, 225–26 (E.D. Ky. 2007)).

way, there can be just one answer—a *cost* incurred by a business (let alone a bankrupt one) by definition provides no benefits and, arguably, does not become actual or necessary until the debtor receives the bill, which may not occur until after plan confirmation. Only by analyzing the cost's purpose—assessing the *services* provided in exchange—can courts determine whether the expense meets § 503(b)'s requirements.

In our case, no party disputes that the debtor's survival as an operating entity required the insurance National Union provided. But under *HNRC*'s holding, by scheduling prospective payments (some of which arise after plan confirmation), the debtor receives a windfall, avoiding the entire post-confirmation portion of the obligation. The *HNRC* court accepted this result on grounds that such post-confirmation payments (unlike the pre-confirmation payments made on the same contract covering the same service) cannot qualify as actual, necessary, or a benefit to the estate by virtue of their post-confirmation nature. But the timing of the payments should not affect the analysis of whether the cost of the service can satisfy the criteria necessary to qualify for administrative priority.

Although *HNRC* noted a lack of authority "support[ing] the contention that expenses nec-

essarily realized post-confirmation can legally be characterized as 'actual' under the Code," 371 B.R. 225–26, this statement ignores the two existing analytical frameworks—one developed by our circuit and the other by our sister circuits—both of which counsel in favor of treating the deductible reimbursements at issue as an administrative expense. Notably, the reasoning of these courts focused not on when a creditor bills the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered. This court, in particular, looks to when "the acts giving rise to a liability took place, not when they accrued" to determine administrative priority. *In re Sunarhauserman*, 126 F.3d 811, 818 (6th Cir. 1997). Confirming that payment timing lacks legal significance in this circuit's bankruptcy law, we held that when a debtor enters a pre-petition agreement to pay for services, making post-petition payments (even if the services were actually rendered post-petition) does not transform the obligation into an administrative expense. *Id.* at 816; *accord In re White Motor Corp.*, 831 F.2d 106, 110 (6th Cir. 1987). Other courts contrast an actual benefit with a potential one, holding that "the mere potential of benefit to the estate is insufficient for the claim to acquire status as an administrative expense." *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 866 (4th Cir. 1994) (internal emphasis, quotation marks, and citations omitted; outlining

similar holdings in other courts). Under either framework, National Union's claimed administrative expense qualifies—VP Debtors signed the insurance contract post-petition, incurring liability then, and acquired actual, not potential, insurance coverage.

The *HNRC* court likewise erred in rejecting the insurer's claim as neither "necessary to preserve the estate," nor for the "benefit of the estate." The panel held that "[t]he bottom line remains that [the insured] is not contractually obligated to pay any of the deductible obligations in question until claims are filed, which will necessarily occur post-confirmation." 371 B.R. 226. A cost incurred post-confirmation, so *HNRC* tells us, cannot be necessary to preserve or benefit an estate that no longer exists. But given that a *cost* cannot be necessary to or benefit anyone, let alone a bankrupt estate, the better approach asks whether a creditor provided a necessary service for the estate's benefit and preservation during the debtor's bankruptcy proceedings, not whether the creditor billed the debtor for those services during that time.

The Supreme Court held in *Reading Co. v. Brown*, 391 U.S. 471 (1968), that "the cost of insurance against tort claims arising during [bankruptcy] is an administrative expense payable in full . . . before dividends to general credi-

tors." *Id.* at 483. The *HNRC* decision fails to adequately account for this clear and controlling statement of law. Though VP Debtors argue that *Reading Co.* applies to insurance premium payments only (and that this case implicates only loss-sensitive deductible reimbursement payments), they posit a distinction without difference. All agree that the post-confirmation insurance payments at issue represent part of the price of the insurance. If instead of insurance this case involved the purchase of raw materials for steel that the debtor, a steel producer, needed to fulfill an order, and managed to purchase on similar terms, no one would seriously contend that because the payments were slated to occur post-confirmation the steel was not necessary to preserve the estate.

This court consistently holds that when an estate derives a benefit from goods, services, or its own actions (breaching a contract, for example), the associated cost qualifies as an administrative expense, even when the cost remains unknown at plan confirmation. *See In re Eagle-Picher Indus., Inc.*, 447 F.3d 461, 464 (6th Cir. 2006) (citing with approval the practices of this and other courts allowing tort, patent infringement, trademark infringement, and breach of contract claims as administrative expenses); *In re United Trucking Serv. Inc.*, 851 F.2d 159, 162 (6th Cir. 1988) (concluding damage estimates

rather than actual damages could serve as the basis for calculating the amount of an administrative expense for a breach of contract claim). Neither the contingent or unliquidated nature of a claim nor the timing of the payments should affect whether the service in question qualifies as an actual expense necessary to preserve the estate.

The *HNRC* decision will, as National Union warns, likely spell an end to the availability of extended payment terms for insurance in the bankruptcy setting. The full court should use this case to take another look at *HNRC*.

APPENDIX B – MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO (EASTERN DIVISION) DATED SEPTEMBER 29, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,	)	CASE NO.: 1:08 CV 196
Appellant,	)	JUDGE DONALD C. NUGENT
v.	)	
VP BUILDINGS, INC.,	)	MEMORANDUM OPINION AND
Appellee.	)	ORDER

This matter is before the Court upon an appeal from a December 21, 2007 Order of the United States Bankruptcy Court for the Northern District of Ohio. (ECF # 1.) Before the Bankruptcy Court, Appellant National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") sought allowance of an administrative

expense claim against Appellee VP Buildings, Inc. and certain affiliated entities (collectively the "VP Debtors").[1] The VP Debtors objected to the allowance of this claim, and sought judgment in their favor disallowing the administrative expense claim to the extent that the claim accrued post-confirmation. The Bankruptcy Court ultimately denied National Union's request for administrative expense status to the extent that it sought payment of claims paid post-confirmation or claims estimated to be paid in the future. Hence, the Bankruptcy Court granted summary judgment to the VP Debtors on National Union's administrative expense claim.

On appeal, National Union seeks reversal of the summary judgment granted to the VP Debtors on its administrative expense claim. For the reasons that follow, the decision of the Bankruptcy Court is AFFIRMED.

I.

The following constitutes a brief history of the background relevant to the instant bank-

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[1] The VP Debtors include VP Buildings, Inc., United Panel, Inc., Varco Pruden International, Inc., VP-Graham, Inc., and LTV-Walbridge, Inc. – all subsidiaries of the LTV Corporation.

ruptcy appeal: On December 29, 2000, the VP Debtors filed voluntary Chapter 11 petitions. On December 17, 2003, the Bankruptcy Court confirmed the VP Debtors' First Amended Joint Plan of Liquidation and dissolved the bankruptcy estates.

National Union provided insurance coverage to the VP Debtors both before and after they filed the Chapter 11 petitions. More specifically, from 1987 through 2001, National Union provided the VP Debtors with workers' compensation, automobile liability and general commercial liability insurance coverage. In September 2003, National Union filed administrative expense claims for "premiums, deductibles, self-insured retention, re-imbursement obligations, fees, expenses and related costs incurred after the date of their bankruptcy petitions." (ECF # 16 at 17.) The VP Debtors challenged the administrative expense claims.

In June 2004, the Bankruptcy Court entered an agreed order compelling arbitration of this dispute. Pursuant to the Order, the award was to establish the amount of Nation[al] Union's post-petition claims, and the Bankruptcy Court would then determine whether such claims were administrative expenses. National Union claims that, as determined in the arbitra-

tion, the amount of its claim against the VP Debtors is $993,769.00.[2] (*Id.* at 18-19.)

National Union and the VP Debtors filed cross–motions for summary judgment on National Union's administrative expense claim. In resolving the Motions, the Bankruptcy Court stated the following:

> It is undisputed that VP Debtors' obligation to reimburse National Union for loss deductibles does not arise until National Union actually pays such claims. It is further undisputed that National Union seeks administrative expense status for claims that it paid post-confirmation and claims that have not yet arisen and are simply estimates by National Union of potential future payments. Pursuant to the terms of the VP Debtors' confirmed plan, the estates of the VP Debtors were dissolved as of the plan's effective date. Accordingly,

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2 The VP Debtors, however, have asserted that this amount was never determined to be properly allocable by the arbitration panel. (ECF # 19 at 7, n.3.) Further, the VP Debtors state that they "have not substantiated that they are liable for such amount." (*Id.*)

> the VP Debtors' bankruptcy estates ceased to exist as of the plan's effective date, December 17, 2003. The issue then is whether National Union is entitled to an administrative expense claim for expenses that did not arise, pursuant to the terms of the agreement with VP Debtors, until after the VP Debtors ceased to exist.

(ECF # 1 at 7-8 (internal citations omitted).) In the December 21, 2007 Memorandum of Opinion and Order, the Bankruptcy Court found that National Union's request for administrative expense status failed in two regards. First, because the claims at issue arose post-confirmation, the Bankruptcy Court found that they cannot be said to have preserved the estate under 11 U.S.C. § 503(b). (*Id.* at 8.) Second, because National Union sought payment of estimated claims that it may, or may not, have to pay at some future date, the Bankruptcy Court determined that such expenses are not "actual" as required by § 503(b). (*Id.*) Based upon these findings, the Bankruptcy Court denied National Union's request for administrative expense status to the extent that it sought payment of claims paid post-confirmation or claims estimated to be paid in the future, and granted summary judgment to the VP Debtors accordingly. (*Id.* at 11.)

II.

According to National Union, the issue here is whether it is entitled to payment for the insurance coverage it provided to the VP Debtors' bankruptcy estates for part of the period after filing the bankruptcy petition, but before the confirmation of the liquidating plan, specifically for 2001. (ECF # 16 at 6.) In its Opening Brief, National Union asserts that the relevant payment terms were set forth in two documents, namely the 1999 Payment Agreement and the 2001 Schedule of Policies and Payment Obligations, which required the VP Debtors to partially reimburse many of the payments made by National Union. (*Id.* at 8-10.) National Union explains that the re-imbursements took place in various forms, which it summarizes as follows:

> National Union was responsible for claims after 2001 for occurrences that fell within the 2001 policies but had not yet been reported, and for additional costs on claims already reported. In turn, the Debtors were obligated to reimburse National Union for these payments. These obligations remained in force until all were paid and were expressly agreed to be part of the price that the Debtors agreed to pay for the

> workers' compensation insurance coverage that National Union provided for the post-petition, pre-confirmation period.

(*Id.* at 13.)[3] National Union contends that the insurance coverage it provided post-petition was necessary to the VP Debtors' continued operations and conferred benefits on the bankruptcy estates. (*Id.* at 14-16.) As such, National Union asserts that the claim is entitled to administrative expense priority. (*Id.* at 21.)

> From a policy perspective, National Union argues:
>
> It makes perfect sense that buying insurance would be deemed part of the actual and necessary cost and expense of preserving the estate and, thus, entitled to administrative priority. Without the

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3 National Union states that the loss-sensitive premiums and reimbursement requirements worked to the VP Debtors' advantage, in that, rather than paying a large up-front premium in exchange for National Union paying the entire loss and bearing more of the risk, the VP Debtors paid a much lower premium up front, shared the cost with National Union, and paid their deductibles over time. (ECF # 16 at 13.)

> priority, no one would sell insurance to a debtor in possession, and all hope of keeping the business running as a "going concern" for the eventual benefit of creditors would be lost.

(*Id.* at 23 (internal citation omitted).) National Union contends that, because the VP Debtors understood the obligations associated with purchasing the insurance and obtained the benefits of such coverage, they cannot now avoid paying for it. (*Id.* at 24.)

III.

National Union has appealed the December 21, 2007 Order of the Bankruptcy Court pursuant to 28 U.S.C. § 158, and this Court shall review its conclusions of law *de novo*. *See In re Made in Detroit*, 414 F.3d 576, 580 (6th Cir. 2005).

The statute relevant to this appeal, entitled "Allowance of administrative expenses," provides that administrative expense status shall be allowed for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). The Sixth Circuit applies what is known as the "benefit to the estate test," which allows administrative expense status only if: (1) the debt arose from a transaction with the

bankruptcy estate and (2) it directly and substantially benefitted the estate. *See In re Sunarhauserman, Inc.*, 126 F.3d 811, 816 (6th Cir. 1997). National Union bears the burden of demonstrating its entitlement to an administrative expense priority by a preponderance of the evidence. *See In re Liberty Fibers Corp.*, 383 B.R. 713, 716 (E.D. Tenn. 2008). Further, the Sixth Circuit has instructed that administrative expense priorities should be narrowly construed in order to maximize the value of the estate preserved for the benefit of creditors. *See id.* at 717.

As noted above, the Bankruptcy Court found that, because the claims at issue arose post-confirmation, they cannot be said to have preserved the estates under § 503(b). The Bankruptcy Court made this determination based upon the fact that the bankruptcy estates ceased to exist as of December 17, 2003, the date it entered its Order confirming the First Amended Joint Plan of Liquidation Despite National Union's arguments to the contrary, courts within this district have indeed recognized the termination of the estate upon confirmation. *See, e.g., In re HRP Auto Ctr., Inc.*, 130 B.R. 247, 256 (Bankr. N.D. Ohio 1991) (finding that the bankruptcy estate "ceases to exist upon confirmation"); *see also Guy v. Terex Corp.*, No. 91-3687, 1992 WL 88978, at *4 (6th Cir. April 30, 1992) ("Because there is no need to preserve an estate that has been ter-

minated, costs that are incurred after that time are not administrative expenses of the estate."). Because National Union's post-confirmation claims cannot be said to have preserved the estates, which terminated on December 17, 2003, the Bankruptcy Court properly denied such claims administrative expense status.

The Bankruptcy Court likewise found that, because National Union sought payment of estimated claims that it may, or may not, have to pay at some future date, such expenses are not "actual" as required by § 503(b). This Court agrees that estimates of future claims are not "actual" as required by the statute. That is, the relevant test requires that the actual, necessary costs and expenses the [sic] of preserving the estate must result in a benefit to the estate. Thus, the estate must receive a real benefit from the transaction before administrative expense priority will be assigned. In this case, National Union seeks administrative expense status for speculative future claims arising post-confirmation that cannot be said to benefit the estates. As recognized by the Bankruptcy Court, such claims, by definition, are not actual under the statute.

Finally, this Court would be remiss in failing to address National Union's argument that the Bankruptcy Court's ruling results in a windfall to the VP Debtors, which may have a chilling

effect on the willingness of insurance companies to provide coverage after the filing of a bankruptcy petition. There exists no dispute that the insurance allowed the VP Debtors to operate legally during the bankruptcy. To that end, the VP Debtors paid premiums to National Union under the policy, which were administrative expenses of the estates. In this way, both National Union and the VP Debtors received the benefit of their insurance bargain. Thus, there exists no windfall and no resulting chilling effect under these circumstances.

IV.

The Court has reviewed the December 21, 2007 Order of the Bankruptcy Court *de novo*. Moreover, it has considered all of the filings of the parties, the oral arguments presented by counsel, and the relevant law. Based upon this review, the Court finds no error in the December 21, 2007 Order. Thus, the Bankruptcy Court's denial of National Union's request for administrative expense priority status is AFFIRMED. This case is TERMINATED.

IT IS SO ORDERED.

s/Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: September 29, 2008

APPENDIX C – MEMORANDUM OF OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF OHIO (EASTERN DIVISION) DATED DECEMBER 21, 2007

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

In Re:	**In Proceedings Under Chapter 11**
LTV STEEL COMPANY, INC.,	**Case No.: 00-43866**
Debtor.	**CHIEF JUDGE RANDOLPH BAXTER**

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Motion of National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union") for Summary Judgment and VP Buildings, Inc.'s opposition and Cross-Motion for Summary Judgment. National Union also opposes VP Buildings' Cross-Motion. This Court

has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 of this District. This is a core proceeding pursuant to 11 U.S.C. § 157(a)(2)(B) and (O). After considering the parties' pleadings, including supplemental memoranda, and conducting a hearing, the Court rules as follows:

*

National Union seeks allowance and payment of an unsecured claim against VP Debtors in the amount of $7,758,832.00.[1] National Union further seeks allowance of an administrative expense claim against VP Debtors in the amount of $993,769.00. VP Debtors objects to the allowance of both claims and seeks judgment in its favor disallowing the unsecured claim as late filed and disallowing the administrative expense claim to the extent the claim accrued post-confirmation.

The following facts appear undisputed: National Union provided insurance coverage to LTV and LTV related-debtors. This coverage spanned both pre and post-petition time periods. As a re-

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[1] In its Motion, National Union also sought payment from New Copperweld Debtors but has since settled its claim against them.

sult of the coverage provided, National Union filed certain claims against LTV and against each of the jointly-administered LTV-related debtors. Certain of the debtors objected to the claims and filed an adversary proceeding against National Union, Adv. Proc. No. 04-4018.

In the adversary proceeding, the complainants objected to National Union's claims and asserted a right to seek a return of certain letter of credit proceeds. National Union filed a Motion to Compel Arbitration. That Motion was initially opposed, but the parties later entered into an agreed order and the proceeding was referred to arbitration. The agreed order, in pertinent part, provided that:

> E. The award of the arbitrators shall establish the amount of National Union's pre-petition and/or post-petition claims, if any, in these cases, and upon completion of the arbitration the claims shall be allowed in the amounts so determined....
>
> F. The Bankruptcy Court shall decide whether National Union's post-petition claims are afforded administrative status.

(June 16, 2004 Order in Adv. Proc. 04-4018).

Appendix C

The Panel of Arbitrators conducted hearings and considered the evidence adduced. The Panel issued a decision on February 28, 2006, in which it found that, *inter alia,* National Union had a post-petition claim in the amount of $2,494,498.00 and a general unsecured claim in the amount of $7,758,832.00.[2]

National Union then filed a Motion with this Court for an Order 1) confirming arbitration award; 2) allowing certain of National Union's Claims Against Certain Copperweld and VP Debtors; and 3) For Leave to File Such Award Under Seal. According to the Motion, National Union alleges that it is entitled to the following:

VP Debtors	$2,499,498	Administrative Claim
New Copperweld	$2,499,498	Administrative Claim

[2] The Court granted the Motion of New Copperweld to file confidential pleadings. *(See* March 7, 2007 Order). The Motion was filed based on a Confidentiality Agreement entered into by the parties with respect to the Arbitration Award. This Order refers only to matters raised by the parties in non-sealed documents and is therefore consistent with the order granting the Motion to file confidential pleadings.

Appendix C

VP Debtors	$7,758,832	VP Class 3-A Claim
Copperweld Distribution Trust	$7,758,832	Copperweld Class 3 Claim

The Motion was opposed by the VP and New Copperweld debtors and this Court set a briefing schedule for dispositive motions. National Union has since settled with the Copperweld Distribution Trust and New Copperweld debtors. There is now pending before the Court National Union's motion for summary judgment, the VP Debtors' Cross-Motion and opposition to National Union's motion, and National Union's opposition to VP Debtors' Cross-Motion.

**

National Union moves for summary judgment on its administrative expense claim against the VP Debtors in the amount of $993,769.00.[3] National Union also seeks sum-

[3] This is the amount of the post-petition claim National Union attributes to VP Debtors. *See* National Un-

mary judgment on its unsecured claim against the VP Debtors in the amount of $7,758,832.

National Union alleges that its post-petition claim is entitled to administrative expense status because the post-petition insurance coverage provided a necessary benefit to the VP Debtors. With respect to its unsecured claim against VP Debtors, National Union asserts that pursuant to the order referring the adversary proceeding to arbitration, the claim shall be allowed in the amount determined by the Panel.

VP Debtors moves for an order of summary judgment 1) expunging National Union's unsecured proof of claim in its entirety and 2) disallowing National Union's request for payment of its administrative claim. VP Debtors allege that National Union has not met its burden regarding the administrative expense status of its post-petition claim and that only those amounts paid prior to confirmation could be entitled to administrative expense status pursuant to *In re HNRC Dissolution Co.*, 371 B.R. 210 (E.D. KY. 2007).

***

ıon's Amended Supplemental Memorandum ın Support of Motion for Summary Judgment filed July 23, 2007.

Appendix C

The dispositive issue for the Court is whether there exists any genuine issue of material fact in dispute with respect to allowance of National Union's unsecured and administrative expense claims against VP Debtors.

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Summary judgment is appropriate where there is no genuine issue as to any material fact. *See* Fed. R. Civ. P. 56(c)(made applicable by Fed. R. Bankr. P. 7056); *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). Initially, the movant bears the burden of pointing out to the Court the basis for the motion and the elements of the causes of action upon which the non-movant will be unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to the non-movant to establish the existence of a material fact. *Id.*

In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A genuine issue for trial exists when there is "sufficient evidence on which the jury could reasonably find for the plaintiff." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Appendix C

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National Union's motion with respect to its unsecured claim is well-premised. VP Debtors object to National Union's unsecured claim, alleging that it was filed on December 4, one day after the December 3, 2002 Bar Date for filing proofs of claim set by this Court. (*See* this Court's October 15, 2002 Order and Bankruptcy Rule 3003(c)(3), Federal Rules of Bankruptcy Procedure). The agreed arbitration order specifically stated that the claims would be allowed in the amount determined by the Panel. (June 16, 2004 Order in Adv. Proc. 04-4018 at ¶ E). The Panel determined that the amount of National Union's unsecured claim against the VP Debtors was $7,758,832. The arbitration order also specifically reserved administrative expense status for this Court to decide. (June 16, 2004 Order in Adv. Proc. 04-4018 at ¶ F). No other issues relating to the allowance of claims was reserved. Specifically, the agreed order did not reserve decision regarding the timeliness of claims for this Court's resolution. Accordingly, to the extent that VP Debtors had a defense of untimeliness to National Union's unsecured claim, such defense should have been asserted in the arbitration proceeding. National Union is allowed a non-priority unsecured claim against VP Debtors in the amount of $7,758,832. VP Debtors' request

to have the non-priority unsecured claim expunged because it was late-filed is denied.

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National Union also seeks an administrative expense claim against VP Debtors in the amount of $993,769.00. Pursuant to the agreed order, the determination of administrative expense status of National Union's claim was reserved for this Court. (June 16, 2004 Order in Adv. Proc. 04-4018 at ¶ F). It is undisputed that some portion of National's [sic] Union's administrative claim is for loss deductibles on claims that National Union has not yet paid or paid post-confirmation. (*See* National Union's opposition to VP Debtors' Motion at pg. 4 and VP Debtors' Cross-Motion at pg. 16). VP Debtors allege that only claims which were paid prior to confirmation are entitled to administrative expense status. (VP Debtors' Cross-Motion at pg. 16). National Union alleges that post-petition insurance coverage, regardless of when claims are liquidated, is entitled to payment as an administrative expense. (National Union's opposition to VP Debtors' Cross-Motion at pg. 4).

Section 503 of the Bankruptcy Code addresses the requirements for the allowance of administrative expenses and provides, in pertinent part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--
>
> > (l)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered *after* the commencement of the case; ...

11 U.S.C. § 503(b)(1)(A). The two-part test in the Sixth Circuit to determine whether a claimed expense should receive administrative expense status pursuant to § 503(b) is 1) whether the debt arose from a transaction with the bankruptcy estate, and 2) whether such transaction directly and substantially benefitted the estate. *See In re Sunarhauserman, Inc.* 126 F.3d 811, 816 (6th Cir. 1997). Administrative expenses under § 503(b) are "narrowly construed in order to maximize the value of the estate preserved for the benefit of all creditors." *In re Colortex Industries, Inc.*, 19 F.3d 1371,1377 (11th Cir. 1994).

The applicant bears the burden of proving its entitlement to an administrative expense award under 11 U.S.C. § 503(b) and it must demonstrate by a preponderance of the evidence that a substantial contribution was made. *In re*

Buttes Gas & Oil Co., 112 B.R. 191, 193 (Bankr. S.D. Tex. 1989). *See also In re TransAmerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992)(the party seeking an administrative expense claim has the burden to prove by a preponderance of the evidence that it is entitled to such claim); *In re Visi-Trak, Inc.*, 266 B.R. 372, 374 (Bankr. N.D. Ohio 2001). Once the applicant has made a prima facie showing of entitlement to administrative expense status, the burden of production shifts to the objector. *In re Gulf Coast Orthopedic Center, Inc.*, 283 B.R. 335, 340 (Bankr. M.D. Fla. 2002); *In re Primary Health Services, Inc.*, 227 B.R. 479, 484 (Bankr. N.D. Ohio 1998).

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It is undisputed that VP Debtors' obligation to reimburse National Union for loss deductibles does not arise until National Union actually pays such claims. (*See* National Union's Opposition to VP Buildings Motion at pg. 3). It is further undisputed that National Union seeks administrative expense status for claims that it paid post-confirmation and claims that have not yet arisen and are simply estimates by National Union of potential future payments. (*See* Exhibit A to Ciaccio Affidavit, filed under seal and National Union's Opposition to VP Buildings' Motion at pgs. 3-4). Pursuant to the terms of the

VP Debtors' confirmed plan, the estates of the VP Debtors were dissolved as of the plan's effective date. (*See* December 17, 2003 Order Confirming VP Debtors' Plan at pg. 16). Accordingly, the VP Debtors' bankruptcy estates ceased to exist as of the plan's effective date, December 17, 2003. *Id.* The issue then is whether National Union is entitled to an administrative expense claim for expenses that did not arise, pursuant to the terms of its agreement with VP Debtors, until after the VP Debtors ceased to exist. (*See* National Union's Opposition to VP Buildings' Motion at pg. 3).

It is a basic canon of statutory construction that "[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed. 290 (1989). Further, "[t]he language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *United States* v. *Palacios-Suarez,* 418 F.3d 692, 697 (6th Cir. *2005) citing United States v. Boucha,* 236 F.3d 768, 774 (6th Cir. 2001).

Herein, National Union seeks approval of its administrative expense claim pursuant to §

503(b), which states that administrative expense status is reserved for "the actual, necessary costs and expenses of preserving the estate." National Union's request for administrative expense status fails in two regards. First, it is undisputed that the VP Debtors' bankruptcy estates ceased to exist as of December 17, 2003, the date this Court entered its order confirming VP Debtors' plan. (*See* December 17, 2003 Order Confirming VP Debtors' Plan at pg. 16). Accordingly, any claims that arise post-confirmation necessarily cannot satisfy the requirement that they "preserve the estate" and would not be entitled to administrative expense status. Second, National Union seeks payment of claims that have not yet arisen pursuant to the terms of its agreement with VP Debtors, because National Union itself has not paid the claims. (*See* National Union's Opposition to VP Buildings' Motion at pg. 3). National Union instead seeks payment of estimated claims that it may, or may not, have to pay at some future date. Accordingly, such expenses are not "actual" as required by § 503(b). It is further noted that, unlike § 502, which provides a mechanism for estimating general unsecured claims, § 503(b) does not contain a similar provision for claims estimation.

There is no controlling Sixth Circuit authority with respect to the issue of whether expenses incurred post-confirmation satisfy the

administrative expense requirements found in § 503(b). Nor does it appear that any other circuits have addressed this specific issue. However, the Eastern District of Kentucky recently issued a decision, *In re HNRC Dissolution Co.*, 371 B.R. 210 (E.D. KY. 2007), which addressed the issue and which this Court finds persuasive and well-reasoned. In that case, an insurer who sought payment of an administrative expense claim in the amount of $14,500,000.00 for prospective post-confirmation deductible payments on insurance policies entered into by the debtors' estate. The purchaser of the debtors' assets objected to the request for administrative expense on the basis that such future loss deductibles did not satisfy the actual and necessary requirements found § 503(b). The bankruptcy court denied the request for administrative expense and the insurance company appealed.

The district court affirmed the bankruptcy court on appeal. The court noted that at the time the insurance company would be contractually allowed to seek reimbursement from the debtor for payment of the loss deductibles, "the estate will have already dissolved and the Debtors will cease to exist. Consequently, payment of the claimed expenses will in no way act to preserve an estate when there is no estate to preserve." 371 B.R. at 226. The court further noted that the general priority scheme of the Bank-

ruptcy Code is to be strictly construed and that "the payment of the deductibles, when and if they should arise (i.e., become 'actual'), does not provide a direct and substantial benefit to, nor act to preserve, a bankruptcy estate where there is no longer an estate to benefit." *Id.* at 228. This analysis is consistent with the plain language of § 503(b), as discussed above.

Other courts faced with the request for administrative expenses which arose post-confirmation have reached a similar result. In an unpublished decision, the Sixth Circuit rejected the idea that expenses incurred after an estate is dissolved can be administrative:

> The [illegible] of this conclusion becomes apparent upon an examination of the Bankruptcy Code's purpose for giving special priority to administrative expenses. Administrative expenses are given priority because they are actual, necessary costs of preserving the estate. Because there is no need to preserve an estate that has been terminated, costs that are incurred after that time are not administrative expenses of the estate.

Guy v. *Terex Corp.*, No. 91-3687, 1992 WL 88978 at *4. *See also, In re Barker Medical Co., Inc.*, 55 B.R. 435, 436 (Bankr. M.D. Ala. 1985) ("Ad-

ministration of the estate ended with confirmation of the plan. The costs were not incurred by the estate, but were incurred by the debtor after discharge and after confirmation at a time when no estate existed.... By definition, the costs cannot be administrative expenses."); *In re Frank Meador Buick,* 65 B.R. 200, 213 (W.D. Va. 1986)("After confirmation of a plan under Chapter 11, administration of the estate ceases to exist. Thus it is impossible to classify taxes or rents that accrue post-confirmation as administrative expenses for the simple reason that after confirmation there is no longer an estate to administer."); *In re Pauling Auto Supply, Inc.,* 158 B.R. 789, 794 (Bankr. N.D. Iowa 1993) ("Inasmuch as there is no estate, a post-confirmation creditor is unable to obtain administrative status for a post-confirmation claim because there is no estate to preserve."); and *In re James Frederick Severson,* 53 B.R. 8, 10 (Bankr. D. Or. 1985)("For losses or expenses incurred after [confirmation], there could be no claim allowable under § 503(b)(1)(A) as an expense of preserving the estate since no estate existed after that date.")

National Union's argument that the decision in *In re HNRC* is contrary to Sixth Circuit authority is not well-premised. The cases cited by National Union involve situations where an administrative expense claim arose pre-confirmation but was not paid until post-

confirmation. *See e.g. In re Eagle-Picher Industries,* 447 F.3d 461 (6th Cir. 2006). Herein, however, National Union is seeking payment of administrative expenses that did not arise until post-confirmation or may never become actual. (*See* Exhibit A to Ciaccio Affidavit, filed under seal and National Union's Opposition to VP Buildings' Motion at pgs. 3-4). As the court in *HNRC* stated:

> In the end, beyond the reality that the deductibles will not come due until after the estate dissolved (which is also common in the post-confirmation judgment cases), it is the special case here that the deductible obligations do not even exist until claims arise whereby Zurich must advance payment.

371 B.R. at 228. As stated by National Union in its papers, "reimbursement does not fall due until the loss is settled or otherwise paid." (*See* National Union's Opposition to VP Buildings' Motion at pg. 3). To the extent National Union is seeking reimbursement from VP Debtors on claims it paid post-confirmation, such request does not satisfy the requirements of § 503(b)(1) because the estates ceased to exist at confirmation. Necessarily, claims which National Union is merely estimating it may have to pay at some point in the future also do not satisfy § 503(b)(1)

requirements. Accordingly, National Union's request for administrative expense status is denied to the extent it seeks payment of claims paid post-confirmation or claims estimated to be paid in the future.

******

Accordingly, National Union's Motion for Summary Judgment is hereby granted, in part, and is hereby denied, in part, as determined herein. It is further ordered that VP Debtors' Cross Motion for Summary Judgment is hereby granted, in part, and is hereby denied, in part, as determined herein. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter
JUDGE RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES
BANKRUPTCY COURT

Dated,
this 21 day of
December 2007.

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 31, 2010

No. 08-4537

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 31 2010
LEONARD GREEN, Clerk

NATIONAL UNION FIRE INSURANCE COMPANY,	)	
Appellant,	)	
v.	)	ORDER
VP BUILDINGS, INC.,	)	
Appellee.	)	

BEFORE: KENNEDY, COOK, and WHITE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court,

---

* Judge Moore recused herself from participation in this ruling.

and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E – STATUTORY APPENDIX

11 U.S.C. § 503: Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(1)(A) the actual, necessary costs and expenses of preserving the estate including--

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on

which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax--

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C),

as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by--

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543

of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred--

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

***

11 U.S.C. § 507: Priorities

(a) The following expenses and claims have priority in the following order:

***

(2) Second, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.

***

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No. 10-711

(3)

Supreme Court, U.S.
FILED
FEB 2 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioner,

v.

VP BUILDINGS, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The United States Bankruptcy Code, 11 U.S.C. §§ 503(b)(1)(A) and 507(a), provides that claims for costs and expenses incurred during the administration of a bankruptcy case, denominated as administrative expense claims, may be eligible for priority of payment.

Petitioner, National Union Fire Insurance Company of Pittsburgh, Pa. provided VP Buildings, Inc., a debtor in possession, together with its affiliated debtor companies, insurance coverage for workers' compensation risks attendant to the operation of debtor's business during the bankruptcy administrative period.

The terms of such coverage provided that Petitioner administer, adjust and pay workers' compensation claims for injuries that occurred during the coverage period, whether such claims were made during or after such period. VP Buildings, Inc. was obligated to *reimburse* Petitioner for the deductible portion of such payments *after* Petitioner advanced such payments to claimants.

The narrow issue presented by this case is whether Petitioner may, notwithstanding the terms of the insurance contracts making VP Buildings, Inc.'s reimbursement obligation contingent on Petitioner's payment obligation, force VP Buildings, Inc. to immediately pay, as an administrative expense, estimated future deductibles that Petitioner had not yet paid as of the termination of VP Buildings, Inc.'s bankruptcy estate and may never pay.

CORPORATE DISCLOSURE STATEMENT

VP Buildings, Inc. has been dissolved. VP Buildings, Inc. Distribution Trust, its successor in interest, has no parent corporation and no publicly owned corporation owns ten percent or more of the stock of VP Buildings, Inc. Distribution Trust.

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STATEMENT

This is a dispute about a contract and whether a Bankruptcy Court may alter its terms to rescue a creditor from its own miscalculations. For many years, Petitioner, a sophisticated nationally recognized insurer, provided, in arms-length business transactions, workers' compensation insurance coverage to LTV Corporation ("LTV"), together with certain of its subsidiaries and affiliates, including VP Buildings, Inc. ("VP Buildings"). These arrangements were renewed immediately after LTV, together with its subsidiaries and affiliates, including VP Buildings, filed voluntary petitions for relief under chapter 11, of title 11, of the Bankruptcy Code (the "Code") on December 29, 2000 (VP Buildings, together with four other LTV subsidiaries, are hereinafter collectively referred to as the "VP Debtors").[1]

The parties agree that, like most entities operating in bankruptcy, VP Debtors was required to secure workers' compensation insurance. Pet. 2. The terms of the workers' compensation insurance coverage provided by Petitioner to VP Debtors was reflected in various insurance policies issued by Petitioner (the "Policies"). Payment of the coverage provided under the Policies was governed by the terms of a payment agreement (the "Payment Agreement") to which a Schedule of Policies and Payments (the "Schedule") was appended.[2]

---

1. VP Buildings was liquidated pursuant to the First Amended Joint Plan of Liquidation for VP Buildings, Inc., Its Subsidiary Debtors and Certain of Its Debtor Affiliates (the "Plan").

2. See Appendix to Brief of Appellant, National Union Fire Insurance Co. of Pittsburgh Pa., On Appeal from the United States Bankruptcy Court for the Northern District of Ohio, ("Pet. Dist. App.") at A171-81, A45-48.

The Payment Agreement provided, among other things, for the advance by Petitioner of the deductible portion of any loss for which VP Debtors was liable under the Policies, and the concomitant obligation of VP Debtors to reimburse Petitioner for such advances ("Deductible Loss Reimbursements"). Pet. Dist. App. A173, A47.

The services performed by Petitioner under the terms of the Policies and the Payment Agreement were, thus, two-fold. First, Petitioner must pay claimants damages, benefits or indemnity for which it is obligated under the terms of the Policies; second, Petitioner must advance on behalf of VP Debtors the deductible portion of any payments it makes to claimants under the terms of the Payment Agreement. Pet. Dist. App. A171-181, A45-47.

The foregoing insurance arrangements, consisting of both the provision of insurance coverage under the Policies and the advance of deductible payments under the Payment Agreement, is long recognized in the insurance industry and customarily referred to under different names i.e. a "Large Risk Rating Plan" or "Deductible Reimbursement Program" (the "Program").

In the Schedule appended to the Payment Agreement, an Estimated Payment Obligation[3] of VP Debtors was established. The Payment Agreement, in conjunction with the Schedule, provided the Billing Method pursuant to which various premium and other payments were to be made by VP Debtors, together with the due dates

---

3. Capitalized terms used and not otherwise defined herein shall have the meanings ascribed to them in the Payment Agreement.

for such payments. Under the Payment Agreement, Petitioner reported on a monthly basis to VP Debtors the Loss Deductibles paid under the Policies and billed VP Debtors at its address reflected in the Schedule. In the case of Loss payments that exceeded the stated Sizable Loss Payment Amount, VP Debtors was required to pay the bill issued by Petitioner within ten days of its receipt. Pet. Dist. App. A46-47, A175.

The Schedule further contained a Security Plan which set forth the amount of collateral that Petitioner required VP Debtors to provide, in the form of letters of credit ($41,612,572), cash escrows and obligation bonds (surety). Id. at 47-48. This, in addition to the up-front premium of approximately $967,131, together with deposits and installment deposits, was required of VP Debtors under the terms of the Program. Thus, VP Debtors bore the substantial cost associated with not only the up-front premium, but also the purchase of the letters of credit and other forms of collateral required of it as well.

The amount of the up-front premium, letters of credit, installment deposits, obligation bonds (surety) and other forms of collateral required to be posted by VP Debtors was based upon actuarial assumptions developed by Petitioner, and might be further adjusted, at the unilateral discretion of Petitioner, depending upon the state of VP Debtors' financial condition at any point in time. Pet. Dist. App. A177-78.

The posted collateral was intended to cover Losses, i.e. damages, benefits or indemnity for which Petitioner became obligated under the terms of the Policies to pay to claimants, including Deductible Loss Reimbursements, i.e.

the portion of any Losses and Allocated Loss Adjustment Expense that Petitioner advanced on VP Debtors' behalf under the Policies. Pet. Dist. App. A173.

Petitioner was under no illusions at the time it entered into the Payment Agreement that VP Debtors, as a debtor-in-possession in an ongoing bankruptcy, had, as an operating company, anything but a short life expectancy, and knew or should have known that workers' compensation claims would extend well beyond the lifespan of VP Debtors itself. In these circumstances, the insurance premiums required by Petitioner and the collateral posted by VP Debtors were intended to cover all such Losses of Petitioner, including Deductible Loss Reimbursements under the Program.

In September 2003, shortly before the Plan was confirmed, Petitioner, apparently realizing it had miscalculated its collateral needs, submitted a claim for administrative expense priority. Pet. 8. The administrative claim included claims for Deductible Loss Reimbursement amounts that Petitioner had not yet advanced to injured workers for a variety of reasons, including that, in many cases, injuries had been incurred but not reported and, therefore, such claims might never be reported or paid. Thus, Petitioner's self-styled request for "reimbursement" was in reality a request for an acceleration of the Payment Agreement, contrary to its terms, and, based on actuarial estimates, of amounts that might or might not be due in the future. Furthermore, the disputed claims for "reimbursement" were for estimated payments that, if ever made, would not be made until after the termination of the VP Debtors' bankruptcy estate. *See, e.g.*, Pet. 10.

In the event Petitioner deemed itself undersecured, it not only could have demanded additional collateral, it could have actively participated in the Plan confirmation process and negotiated post-confirmation payments or the establishment of some form of escrow arrangement through incorporation of such requirement in the terms of the Plan. Nothing in the record indicates that National Union participated in the Plan confirmation process or, in fact, contributed anything to the formulation of the Plan. Instead, Petitioner elected to file a proof of claim and subsequently absent itself from the bankruptcy proceedings. Had Petitioner taken upon itself to defend its own interests, some alternative mechanism to that provided in the Payment Agreement might have supplemented the payment and collateral requirements provided thereunder to cover any incurred but not reported losses of Petitioner in the future.

Instead, Petitioner relied on the administrative expense process to solve its shortfall. The Code provides that creditors who extend goods and services to debtors in bankruptcy for the "actual, necessary costs and expenses of preserving [their] estate" are entitled to administrative priority, or in other words, to be paid ahead of unsecured creditors. 11 U.S.C. §§ 503(b)(1)(A), 507(a). VP Debtors filed an objection to those portions of Petitioner's claim for "reimbursement" that were for amounts Petitioner had not yet advanced and would not advance until after the termination of the VP Debtors' bankruptcy estate, if ever.

Pursuant to an Order of the United States Bankruptcy Court for the Northern District of Ohio (the "Bankruptcy Court"), certain matters were referred to arbitration, including, *inter alia*, the amount of Petitioner's claim

attributable to the post-petition period, and whether Petitioner was entitled to apply the proceeds of the letters of credit VP Debtors had supplied to such amounts. Pet. Dist. App. 414-415. The arbitrators determined that, the proceeds from the letters of credit which Petitioner had previously drawn down in reimbursement for its Losses were to be applied toward payment of its claims. However, this, in addition to the up-front premium and additional deposits previously paid by VP Debtors to Petitioner under the governing terms of the Payment Agreement, still was not sufficient to cover all of Petitioner's purported Losses. Petitioner asserts that the panel of arbitrators projected unreimbursed post-petition Losses of $2,494,498 with respect to the workers' compensation insurance issued to LTV and affiliates for Policy Year 2001, of which the pro rata share attributable to VP Debtors is approximately $993,769. Pet. 8-9. The Bankruptcy Court then considered whether this amount, which includes estimated future Deductible Loss Reimbursements, qualified as an administrative expense pursuant to the Bankruptcy Code.

The Bankruptcy Court, District Court and the Sixth Circuit all declined Petitioner's invitation to use administrative priority as a means of rescuing it from its own failure to protect its interests. Nevertheless, Petitioner asks this Court to intervene.

The narrow issue presented by this case is whether Petitioner may force VP Debtors to immediately reimburse, as an administrative expense, estimated Loss Deductibles that Petitioner had not yet paid as of the termination of VP Debtors' bankruptcy estate, and may never pay, notwithstanding that VP Debtors' reimbursement obligation is contingent on Petitioner's prior payment obligation.

REASONS FOR DENYING THE PETITION

A Petition for Certiorari should be denied where the decision below does not conflict with the decisions of other Courts of Appeals. Petitioner cites three cases in support of its assertions that various Courts of Appeals, in opposition to the Sixth Circuit, have held that administrative claims need not be liquidated and instead have held unliquidated amounts may properly constitute an administrative expense. However, not one of these cases involves Deductible Loss Reimbursements or analogous contractual provisions under an insurance contract requiring a bankruptcy court to unilaterally rewrite the very terms upon which the contract is based, turning the obligations of the respective parties "on their heads." In the instant case, Petitioner seeks to relieve itself of its own failure to take sufficient collateral to cover Deductible Losses based upon its own inaccurate actuarial assumptions and asks this Court to require VP Debtors to advance Petitioner funds to which it may never be contractually entitled and at VP Debtors' unsecured creditors' expense.

A Petition for Certiorari should be denied where the decision below does not conflict with a prior precedent of this Court. Petitioner asserts that the decision below conflicts with this Court's decision in *Reading*, a case clearly distinguishable from the case at bar. *Reading Co. v. Brown*, 391 U.S. 471 (1968). Damages incurred by the petitioner in *Reading* for which it sought administrative priority were entirely post-petition, not post-confirmation. As to the requirement that costs and expenses were required to be "actual," the complete destruction of a building in *Reading* could be nothing other than "actual."

In the instant case, Losses alleged by Petitioner involve workers' compensation claims based entirely upon actuarial assumptions both as to pre-confirmation known claims, as well as to incurred but not reported losses. The latter are unknown and may never be reported or paid.

A Petition for Certiorari should be denied where the decision below does not involve a question of exceptional importance. The decision below involves a very narrow question of law which Petitioner attempts to couch as a dispute involving a legal principle with far-reaching implications in order to cloak the true intention of Petitioner to rewrite the terms of a contract which, in this instance, has worked to Petitioner's disadvantage due to its own missteps. Second, the decision has only rarely been the topic of litigation and, third, to the extent courts have entertained the arguments advanced by Petitioner, each and every court has rejected them.

A. The Decision Below Does Not Conflict with the Decisions of Other Courts of Appeals

Petitioner asserts that the decision below "conflicts with the decisions of other courts of appeals." Pet. 18. That statement is at best, a gross exaggeration, and at worst, completely inaccurate. Other than the Sixth Circuit, no other courts of appeals have considered the precise question confronted here, namely, whether a bankruptcy court may or should rewrite the terms of a payment agreement by granting administrative priority to estimated future Deductible Reimbursements that are not due at the time the priority claim is made and may never come due.

After a lengthy buildup in which Petitioner cites circuit cases for principles that are not disputed by VP Debtors,[4] Petitioner cites only three cases in support of its assertions that "[s]ection 503(b) does not require that, in order to be 'actual,' the administrative claim must be 'liquidated'" and that "[o]ther courts of appeals . . . have concluded that unliquidated amounts can properly constitute an administrative expense." Pet. 21. Not one of the three cases relied on involves estimated deductible loss reimbursements or analogous claims i.e. claims that ask the bankruptcy court to rewrite the terms of a contract. Instead, the supposedly relevant cases involve insurance premiums due and owing pursuant to a policy at the time administrative priority was requested, estimated future claims for environmental cleanup costs under a federal environmental statute, and whether estimated liabilities should be considered for purposes of interpreting New Jersey's fraudulent transfer statute (a case that does not even mention § 503(b) but is offered as an allegedly analogous case). Pet. 21-22.

In further support of Petitioner's unfounded assertion that estimated future Deductible Reimbursements may be granted priority as "actual, necessary costs and expenses," Pet. 18, Petitioner focuses on the definition of "claim," 11 U.S.C. § 101(5), a definition that has absolutely no bearing on whether any particular "claim" is entitled to administrative priority treatment under 11 U.S.C. § 503(b). Pet. 21.

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4. See, e.g., Pet. 18-19 (citing *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950 (1st Cir. 1976) for the proposition that to be an "'actual, necessary' administrative expense, a debt must (1) arise from a transaction with the bankruptcy estate, and (2) directly and substantially benefit the estate.").

Finally, Petitioner asserts that the decisions below conflict with the decisions of other circuits because they allegedly focused on whether "costs" benefited the estate rather than on whether the "consideration supporting the claimant's right to payment" benefited the estate, and on when an expense was billed rather than on when a "service [was] rendered." Pet. 22-23. For the reasons discussed below, Petitioner's arguments are without merit.

The three cases relied on by Petitioner in support of the notion that "unliquidated" expenses should be granted administrative priority are materially distinguishable from the case at bar and i.e. lend Petitioner no aid. In the most factually analogous case, the Eighth Circuit considered whether to grant administrative priority for post-petition workers' compensation premiums that were recalculated post-confirmation pursuant to a retrospective rating policy. *Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829 (8th Cir. 1997). Under the policy, the insured and insurer agreed that the insurer would, at regular intervals, recalculate premiums due based on actual loss experience, which "resulted in a premium refund or an additional premium assessment." *Id.* at 831.

Less than a year after the insured's plan was confirmed, and before the bar date for submission of administrative claims, the insurer, pursuant to the policy, recalculated the premium for both pre- and post-petition periods, and then asserted administrative priority for that portion of the recalculated premium due for the coverage received during the post-petition, pre-confirmation period. *Id.* Both the Bankruptcy Court and the District court granted priority, and the Eighth Circuit affirmed.

This outcome is entirely consistent with the outcomes below in the case at bar; to the extent National Union sought administrative priority for amounts to which it was contractually entitled at the time it submitted its priority request, VP Debtors raised no objection. Unlike the claim in *MEI Diversified*, however, the disputed claim here is not for amounts that were actually due pursuant to the terms of the Payment Agreement. The disputed claim is for an estimate of amounts that may or may not become due in the future, and that indisputably were **not contractually due** from Respondent at the time Petitioner submitted its request. In contrast, the insurer in *MEI Diversified* did not ask the court to rewrite the terms of its contract with the insured and grant administrative priority to an amount **projected** to be due under the contract -- it only asked the court to grant administrative priority to amounts **actually** due under its contract attributable to the post-petition, preconfirmation period. *MEI Diversified* lends Petitioner no support for its contention that other courts of appeals have routinely recognized the type of administrative claim sought here as an "actual" expense.

The second case relied on by Petitioner provides even less support for its argument, as this supposedly analogous case does not involve an administrative priority claim or anything remotely analogous to such a claim. In *Advanced Telecomm. Network, Inc. v. Allen*, a Chapter 11 debtor sought to recover certain pre-petition transfers as fraudulent under New Jersey law. *Advanced Telecomm. Network, Inc. v. Allen (In re Advanced Telecomm Network, Inc.)*, 490 F. 3d 1325 (11th Cir. 2007). The case turned on whether the debtor was "insolvent" at the time the transfers were made as that term is defined under New Jersey's fraudulent transfer

statute. *Id.* at 1332 (interpreting N.J. Stat. Ann. §25:2-27.a). The Eleventh Circuit held that the bankruptcy court erred in making its insolvency determination because it failed to estimate the value of certain outstanding litigation liabilities and thereby overvalued the company. *Id.* While this case certainly establishes that estimates must be used when assessing the value of a company for purposes of determining whether a pre-petition transfer was fraudulent under New Jersey law, it says absolutely nothing about whether estimated future contractual obligations are appropriately deemed "actual" and "necessary" administrative expenses under § 503(b)(1)(A) of the Bankruptcy Code.

Finally, Petitioner relies on *In re Hemingway Transp. Inc.*, a case involving a CERCLA[5] claim by an entity that purchased contaminated land from a bankruptcy estate and was then subject to an enforcement action by the EPA. *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915 (1st Cir. 1993). The purchaser sought administrative priority for current and future costs of cleanup, but the trustee objected that the purchaser's claim was contingent pursuant to 11 U.S.C. § 502(e), a section of the Code that applies when more than one debtor may have a right to a claim. The court remanded the case for a determination by the bankruptcy court as to whether the purchaser was entitled to any of the defenses under CERCLA, a determination that was essential for establishing whether the trustee's objections pursuant to § 502(e) were applicable.

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5. The Comprehensive Environmental Response, Compensation, and Liability Act, Codified at 42 U.S.C. §§ 9601 et seq.

The vast majority of the court's discussion focused on the purposes and interpretations of § 502(e) in the context of CERCLA claims, a provision that has no bearing on this case. Administrative expense priority pursuant to § 503(b) received barely a passing mention, let alone any discussion of why estimated future claims might be deemed "actual" expenses. However, National Union latches onto the court's speculative statement, made without elaboration or authority, that if § 502(e) does not apply, then the Petitioner would be entitled to administrative priority for estimated "past and future response costs." *Id* at 934.

Petitioner's reliance on this hypothetical dicta is misplaced. Even if the court had explained or offered authority for its contention that "estimates" of future CERCLA remediation costs are entitled to administrative priority, expenses incurred under CERCLA bear no relation to expenses incurred under the terms of a freely negotiated contract such as the Payment Agreement in the instant case. The purchaser's claim in *In re Hemingway* is entirely consistent with the structure and purpose of the CERCLA statute, "which entitles plaintiffs to recover their past and future environmental response costs." *American Nat'l Bank and Trust Co. of Chicago as Trustee for Illinois Land Trust v. Harcros Chemicals, Inc.*,1997 WL 281295 (N.D. Ill. May 20, 1997) (citing 42 U.S.C. § 9613(f)). By contrast, here Petitioner seeks revision of the terms of a contract that it agreed to with full knowledge of VP Debtors' financially precarious situation, and that provided it with the means of protecting itself through the adjustment of collateral requirements, which for unknown reasons, it failed to exercise.

Now, Petitioner, in effect, asks this Court to remedy its collateral miscalculation by unilaterally rewriting the Payment Agreement to advance Petitioner money to which it may never be contractually entitled, at the expense of the unsecured creditors. While it is well established that unsecured creditors generally cannot recover before costs associated with compliance with environmental laws are satisfied, *see, e.g., Texas v. Lowe (In re H.L.S. Energy Co.),* 151 F.3d 434 (5th Cir. 1998) (cost of plugging debtor's unused oil wells as required by state environmental law was entitled to administrative priority as actual and necessary expense of the estate); *Cumberland Farms, Inc. v. Florida Dep't of Envtl. Protection,* 116 F.3d 16 (1st Cir. 1997) (penalties stemming from failure to comply with state environmental laws post-petition were entitled to administrative priority); *Alabama Surface Mining Comm'n v. N.P. Mining Co. (In re N.P. Mining Co.),* 963 F.2d 1449 (11th Cir. 1992) (same), Petitioner has pointed to no cases establishing that such a rule should apply to insurers that miscalculate their collateral requirements.

In its effort to persuade the Court that projected claims not yet contractually due are "actual" for purposes of § 503(b) and, therefore, entitled to administrative priority, Petitioner cites § 101(5), which defines the term "claim" for purposes of the Bankruptcy Code. Petitioner implies that because a "claim" includes any "right to payment" whether "liquidated" or "unliquidated," the administrative priority provisions of the Code "do[] not require that, in order to be 'actual,' the administrative expense claim must be 'liquidated.'" Pet. 21. However, Petitioner offers no authority for its insinuation that the terms of § 101(5) have any bearing on whether a particular claim meets the tests for administrative expense priority under § 503(b). In fact, there is ample authority for the opposite.

"Claim" is intended to have a broad meaning, as it is the vehicle through which any and all creditors that have had dealings with a debtor in bankruptcy seek a right to payment. *See, e.g., Lemelle v. Universal Manufacturing Corp.*, 18 F.3d 1268, 1275 (5th Cir. 1994). However, as many of the cases cited by Petitioner make clear, administrative priority is to be narrowly construed. See, e.g. *Supplee v. Bethlehem Steel Corp (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007) ("'[b]ecause the presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among his creditors, statutory priorities are narrowly construed,'" quoting *Trustees of the Amalgamated Insurance Fund v. McFarlin's, Inc.*, 789 F.2d 98, 100 (2d Cir.1986)). As the court in *In re Jack/Wade Drilling* noted, the question in an administrative priority case is not "whether [the creditor] deserves to get paid," (i.e. whether the creditor has a "claim") "but whether [the creditor] deserves to get paid at the expense of [the Debtor's] existing unsecured creditors." *Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 389 (5th Cir. 2001). In sum, administrative priority expenses are a small subset of bankruptcy claims and, therefore, the Code's definition of the term "claim" is in no way determinative of whether a particular "claim" is entitled to administrative priority and, specifically, of whether an unliquidated expense is "actual" for purposes of § 503(b)(1)(A).

In furtherance of its effort to create the perception of a circuit split, Petitioner, with heavy reliance on Judge Cook's concurrence, argues that the decisions below were flawed because they focused on whether "costs" incurred post-confirmation could have benefited the estate rather than on whether the services provided by Petitioner benefited the estate. Petitioner asserts that

other courts of appeals have "'focus[ed] not on when a creditor bills the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered.'" Pet. 22 (citing Cook, J. concurring). Petitioner then concludes summarily that its claimed expenses qualify as an administrative expense under either standard. However, this characterization of the issues, and the conclusions Petitioner draws from it, are flawed. The courts below were not mislead, as Judge Cook was, by a mistaken focus on "costs," which "cannot be necessary to or benefit anyone" Pet. 23 (citing Cook, J. concurring). Rather, they properly focused on when service was rendered and whether "the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor in possession" as Petitioner urges. Pet. 23 (quoting *CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229 (4th Cir. 2005)).

Each of the courts below properly noted that Petitioner had failed to provide all of the services or consideration that would entitle it to payment. For example, the Sixth Circuit Panel held that "National Union's claim will not be 'actual' *until it has made a payment* and seeks reimbursement from the insured . . . ." Pet. App. 9a-10a (emphasis added). The discrepancy in the outcome urged by Petitioner and that reached in the courts below stems not from the application of two different standards, but from an application of one undisputed standard to two different sets of facts. It is only through an oversimplification and distortion of the facts that Petitioner is logically able to reach a result contrary to that reached by the courts below and by the courts in *Zurich Am. Ins Co v. Lexington Coal Co.*, the only case "addressing the same question" Pet. 4,

as the matter at bar. *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)* 536 F.3d 683 (6th Cir. 2008) (affirming the district court's "well reasoned and comprehensive" opinion holding that estimated post-confirmation Deductible Loss Reimbursements were not entitled to administrative priority).

Petitioner would have this Court believe, as Judge Cook apparently did, that its sole obligation under the Program was to provide insurance in calendar year 2001, and that act alone was "consideration supporting the claimant's right to payment." *See, e.g.*, Pet. 16 (stating that Petitioner "supplied vital insurance coverage"). However, as the Program spells out, the terms were more complicated than that. Most importantly, VP Debtors' obligation to pay Deductible Loss Reimbursements to Petitioner was contingent on Petitioner first fulfilling its contractual obligation under the Policies to advance deductibles to claimants on behalf of VP Debtors. The Schedule laid out VP Debtors' payment obligation: "On a Monthly basis, [Petitioner] will report to [VP Debtors] the amounts of Loss and ALAE[6] that [Petitioners] have paid under the Policies. [VP Debtors] must **subsequently** pay [Petitioners] as described below." Pet. Dist. App. A47.

In other words, pursuant to the Program, Petitioner promised to do more than provide insurance coverage during the Policy Year; it promised to advance VP Debtors' deductible obligations to injured workers and then to seek reimbursement for those deductibles. Respondent's

6. "Loss and ALAE" refer to two different components of the deductibles that VP Debtors was obligated to reimburse under the Program.

obligation to reimburse Petitioner was contingent on Petitioner's performance of these obligations. The prices agreed to by Petitioner and Respondent took into account this extension of credit. Clearly, such an arrangement entails risk for both parties, but the Payment Agreement made significant provision for Petitioner to protect itself. It was entitled to and did secure collateral from VP Debtors and affiliates, and it retained the right to unilaterally adjust the collateral to reduce its exposure to the extent the insured's financial situation deteriorated.

In sum, the consideration supporting Petitioner's right to Deductible Loss Reimbursement was not only the provision of insurance under the Policies, but Petitioner's payment of VP Debtors' share of claims submitted by workers injured during the Policy Year. It is undisputed that at the time Petitioner sought administrative priority, it had no contractual entitlement to the claims VP Debtors disputes, because Petitioner had not yet advanced the Deductible Losses to injured workers. In fact, much of its claim was based on actuarial estimates, that by their very nature are speculative and may never materialize. The courts below found it determinative that Petitioner had not yet rendered the services that would entitle it to payment under the governing agreements. For example, as the Bankruptcy Court stated, "National Union seeks payment of claims that have not yet arisen pursuant to the terms of its agreement with VP Debtors, because *National Union itself has not paid the claims.*" Pet. App. 42a (emphasis added).

Thus, while Petitioner and Judge Cook would have this court believe that the decisions below reached the wrong conclusion by focusing on when costs were incurred

or even "billed" (which, incidentally, is a matter entirely within the control of Petitioner), Respondent counters that the decisions below properly focused on whether Petitioner had provided the services that would entitle it to payment. While Petitioner carried out its obligation to provide insurance during the policy year, at the time it sought administrative priority for the disputed claims it had not carried out its obligation to advance Deductible payments on VP Debtors' behalf. Having failed to carry out that portion of its contractual obligations that would have entitled it to Deductible Loss Reimbursement, Petitioner failed to submit an "actual" claim, as the courts below properly recognized.

In sum, there is no circuit split on the specific issue in the instant case, no circuit split on the general standards to be applied, and no error in the decisions of the courts below. The Petition should be denied.

B. The Decision Below Does Not Conflict with a Prior Precedent of this Court

Petitioner asserts that the decision below conflicts with a prior precedent of the United States Supreme Court. The sole decision cited by Petitioner in support of this proposition is *Reading Company v. Brown*, 391 U.S. 471 (1968), a case in which the bankruptcy court appointed a receiver to conduct the debtor's business of leasing a building. The building was totally destroyed by fire, as were several neighboring buildings, including one owned by Reading Company, the primary claimant in that case.

The *Reading* decision, rendered almost a half century ago, implicates section 64(a), of chapter XI, of the former

Bankruptcy Act, 11 U.S.C. § 104(a)(1), the predecessor to § 503(b) of the present Bankruptcy Code, the principal section of the Code which governs the matter at issue in the case at bar. Petitioner, by extensive reference to case law in support of the proposition that the decision in *Reading* survived enactment of the Bankruptcy Code, appears at great pains to persuade this Court that *Reading* retains continued viability. *See, e.g.*, Pet. 26-28. VP Debtors does not take issue with the views expressed in *Reading*, or to its continued viability, aged as that case may be, but VP Debtors does take issue with its applicability to the matters presently at issue. Accordingly, VP Debtors asserts that *Reading* fails to serve as appropriate precedent for the matters addressed in this case and that Petitioner is mistaken in its view that the decision of the Sixth Circuit Court of Appeals below conflicts with prior precedent of this Court.

It is noted, in this regard, that all the cases cited by Petitioner in support of the proposition that *Reading* survived enactment of the current Bankruptcy Code, see Pet. 26-29, may be further distinguished from the case at bar in that they involve costs and expenses incurred by the debtors therein post-petition during the continued operation of their respective businesses. No such case involves costs and expenses sustained by the debtors post-confirmation after the operation of their respective businesses ceased and they were no longer acting as debtors-in-possession.

At the outset, *Reading* involved circumstances totally distinguishable from those presented in the instant case. Damages incurred by the petitioner in *Reading* for which it sought administrative expense priority were entirely

post-petition, not post-confirmation. As a result, the *Reading* Court had no need to and, therefore, did not address whether post-confirmation costs and expenses could be "actual" and "necessary" for the preservation of a debtor's estate at a time when the debtor no longer operated a business or, for that matter, continued to exist. As to the requirement under § 64(a), that costs and expenses were required to be "actual," the complete destruction of a claimant's building in *Reading* could be nothing other than "actual." Such costs were easily determinable by contemporaneous replacement costs and valuation methods and were stated to the penny ($559,730.83). *Reading*, 391 U.S. at 473. In the case at bar, Losses alleged by Petitioner involve workers' compensation claims in amounts that are based entirely upon actuarial assumptions both as to pre-confirmation known claims, as well as to incurred but not reported losses. The latter, by their very nature, are unknown and may, in fact, never be reported or paid. They are typically long-term, extending well into the future and (if insurance related settlements are to serve as precedent) often subject to further adjustment.

Instead of addressing in a meaningful manner the issue of "actual" and "necessary" expenses found in § 64(a) of the Bankruptcy Act, the *Reading* Court elected to address that which it viewed as the decisive, statutory objective of the Bankruptcy Act, that of "fairness to all persons having claims against an insolvent." Pet. 25 (citing *Reading*, 391 U.S. at 477). However, it can hardly be said that "fairness" in one set of circumstances constitutes "fairness" under an entirely disparate set of circumstances.

Petitioner appears to argue, for it is not expressly stated, that were the post-confirmation claims of Petitioner not accorded administrative priority, the "decisive, statutory objective" which the Court in *Reading* sought to achieve would be undermined. In that event, we are informed, Petitioner "caught in a dilemma not of its own making" will be placed at a disadvantage imposed by VP Debtors attempting to escape its own financial dilemma. Pet. 25-26 (citing Reading, 391 U.S. at 477, 483). This is patently not the case. In fact, Petitioner made its own bed and now seeks not to lie in it.

The assertions of Petitioner to the contrary, from the perspective of "fairness to all persons having claims against an insolvent" which the Court in *Reading* sought to assuage, this is not an attempt by VP Debtors to escape from its own financial dilemma and to **unfairly** place the burden of its losses upon the shoulders of National Union. *Reading,* 391 F.2d at 477. The shortfall of Petitioner for any losses it may suffer are attributable solely to its own miscalculated actuarial assumptions, together with its subsequent ineptitude in defense of its own interests. This, notwithstanding its contractual ability to adjust that collateral required to be posted by VP Buildings under the Payment Agreement and to affirmatively protect its own interests in the bankruptcy process.

By this Petition, National Union now seeks to unburden itself of its own miscalculation by seeking administrative expense priority for such shortfall. Providing Petitioner administrative expense priority for post-confirmation losses would ultimately reduce those VP Debtors' assets otherwise available for distribution to its unsecured creditors. In such event, the principle

of "fairness" espoused by the *Reading* Court would be clearly compromised and allow Petitioner to "escape [its] dilemma at the risk of imposing it on others . . . ." *Id.* at 482-83.

Petitioner views its claim for unpaid Deductible Loss Reimbursements as the relevant "actual" and "necessary" costs that should be eligible for administrative expense priority under § 503(b) of the Code. Its premise is that applicable state laws require a debtor to maintain workers' compensation insurance in order to operate in bankruptcy as a debtor-in-possession. Petitioner states, "**when a trustee or debtor in possession operates a bankruptcy estate**, compliance with state law should be considered an administrative expense." Pet.31 (citing *N.P. Mining*, 963 F.2d at 1458) (emphasis added).

VP Debtors agrees that state laws generally require that a debtor maintain workers' compensation insurance in order to operate in bankruptcy as a debtor-in-possession. However, the *Reading* Court, as reflected in the cases the Court cites for such proposition, was clearly referring to claims arising post-petition during the time that the debtor is operating a business as **debtor-in-possession**, not post-confirmation when a debtor is, for all intents and purposes, non-operational and moribund. Any distributions to which creditors are entitled are resolved by confirmation and those expenses necessary to produce such distribution have been incurred pre-confirmation; expenses incurred post-confirmation cannot, by definition, be for the benefit of a debtor's estate. See, e.g. *HNRC*, 371 B.R. at 231-23 (citing cases for the proposition that "expenses arising post-confirmation fail to satisfy the requirements for administrative priority under § 503 for

the simple, yet inescapable reality that there is no estate to preserve or benefit." *Id.* at 231).

VP Debtors acknowledges the *Reading* Court interpreted the cost of insurance against claims arising during a bankruptcy arrangement to be "an administrative expense **potentially** payable in full." *Reading*, 391 U.S. at 483 (emphasis added). Petitioner quoted the opinion of the *Reading* decision in its Brief:

> The Court reasoned, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained; and if a receiver or debtor in possession is to be encouraged to obtain insurance in adequate amounts, the claims against which insurance is obtained **should be potentially payable in full**."

Pet. 26 (emphasis added).

The limited reference by the *Reading* Court to "premiums," as in most of the cases cited by Petitioner in the context of the "cost" or "expense" of insurance, reflect the customary terms of an insurance policy, not the financial payment arrangements presented by the Payment Agreement. Reference by the *Reading* Court to the ability of a debtor to obtain insurance which "should be potentially payable in full" is perfectly apt in the instant circumstances. The Deductible Loss Reimbursements for which provision is made in the Payment Agreement are, **in fact**, "potentially payable in full." That is the purpose of the contractual requirement for the payment of "premiums" thereunder, as well as the requirements

for additional cash deposits or the adjustment of required collateral in the event, among other things, of a change in the debtor's financial position.

Lastly, Petitioner claims that VP Debtors would keep the benefit, but avoid the burden, of the insurance that Petitioner supplied; that Petitioner will be "obligated to pay benefits to employees injured in 2001, but with no way to obtain the very reimbursement from the VP Debtors that the VP Debtors agreed to pay." Pet. 31. This is a retrospective view, analogous to "looking over one's shoulder," resigned to the fact that one can no longer recover that which was once obtainable if only the appropriate action had been taken in a timely manner. Petitioner could have **potentially** recovered an amount that would have yielded it the equivalent of "reimbursement in full," as it was empowered to do so by the terms of the Payment Agreement. In fact, Petitioner was empowered to take any number of actions which could have obviated the financial strait in which it now alleges it finds itself.

The Payment Agreement is replete with financial preconditions imposed upon VP Debtors to ensure that sufficient funds remain accessible or otherwise available to Petitioner in satisfaction of VP Debtors' obligations. VP Debtors is required to pay a Deposit, including a Claims Payment Deposit, Installments, together with Additional Payments, in amounts and by the dates set forth in Schedules appended to the Payment Agreement. Pet. Dist. App. A46-47. VP Debtors is further required to deliver Collateral acceptable in form and amount to Petitioner to secure VP Debtors' obligations under the Payment Agreement. *Id.* at A47-48.

Pursuant to the terms of the Payment Agreement, VP Debtors grants to Petitioner a continuing first-priority security interest and right of offset with respect to all premiums, surcharges, dividends, cash, accounts, or funds that are payable to VP Debtors and that currently or in the future come into the possession of VP Debtors in connection with its obligation under the Payment Agreement. *Id.* at A177. Any letters of credit that serve as collateral must be clean, unconditional, irrevocable and evergreen. *Id.*

The collateral supplied by VP Debtors to Petitioner to ensure the obligations of VP Debtors under the Payment Agreement is subject to annual review by Petitioner, and such further review and revision as Petitioner "deems reasonably necessary," including at any time upon the occurrence of any one of numerous events, e.g.:

> the failure or violation [by VP Debtors] of any financial covenants or tests, or minimum financial rating (if any) specified in the Schedule,
>
> or
>
> any material adverse change in the financial condition of [VP Debtors], [its] subsidiaries or affiliates taken or in combination, or any other entity on which [Petitioner] may rely for security or guarantee.

Id.

In other words, Petitioner retained numerous means at its disposal to "obtain the very reimbursement from the

VP Debtors that the VP Debtors agreed to pay." If any party bore the burden of loss, the terms of the Payment Agreement laid that burden squarely upon the VP Debtors. The loss suffered by Petitioner had nothing to do with the actions of the VP Debtors. The loss sustained by Petitioner was due singularly to its failure to take sufficient steps to protect itself from the inevitable termination of VP Debtors' estate. Had Petitioner demanded additional collateral or ensured that the Plan provided for recovery of monies post-confirmation in reimbursement for payments it would have to make in the future, Petitioner would not have suffered the shortfall it now alleges.

C. The Decision Below Does Not Involve a Questions of Exceptional Importance

The decision below does not involve a question of exceptional importance. First, the decision involves a very narrow question of law. Second, this alleged "vitally important question of bankruptcy law" has only rarely been the topic of litigation, strongly suggesting that Petitioner's concerns about "gravely negative consequences for chapter 11 reorganizations" are overblown, to say the least. Pet. 5, 32. Finally, to the extent courts have entertained the arguments advanced by Petitioner, each and every court has rejected them. The only sympathetic judicial reaction such views have received is that expressed in a Sixth Circuit concurrence by Judge Cook, joined by Judge White, who misconstrued the issues.

The narrow issue before this Court is whether Petitioner may force VP Debtors to immediately pay, as an administrative expense, estimated future Deductibles that Petitioner failed to pay as of the termination of VP

Debtors' bankruptcy estate and, in fact, may never pay, notwithstanding that the terms of the Policies and the Payment Agreement make VP Debtors' reimbursement obligation contingent on Petitioner's prior payment obligation. As recognized by the District Court in *HNRC*, the only case on record addressing the same "very narrow issue," the question is "whether [ ] prospective deductible obligations should receive administrative expense treatment." *HNRC*, 371 B.R. at 223.

Nevertheless, Petitioner has sought to couch the legal principle at issue as one with far-reaching legal implications. In fact, the legal principle at issue may involve no greater consequence than the interpretation to be given the terms of a relatively uncomplicated Payment Agreement between the contracting parties. Post-confirmation costs and expenses for which Petitioner seeks administrative expense priority are basically Deductible Loss Reimbursements which, as defined under the terms of the Payment Agreement, consist of the portion of any claims that Petitioner pays and which VP Debtors is obligated to reimburse. This includes any amount that Petitioner has advanced on behalf of VP Debtors for self-insured Deductibles under the Policies listed on the Schedule appended to the Payment Agreement. This is a simple, forthright, contractual obligation that "reimbursement" by VP Debtors follows "payment" by Petitioner, not the other way around. Despite the straightforward terms of the parties' Payment Agreement, and Petitioner's capacity to control the terms of any future such agreements it enters, Petitioner would have this Court believe that its immediate intervention is required to prevent "grave consequences."

For evidence that Petitioner's fears are overblown, one need look no further than to the fact that very few courts have ever been asked to address the issue at bar. As recently as 2007, the District Court in *HNRC* noted in its "comprehensive and well- reasoned opinion," HNRC 536 F.3d at 684, that the test for administrative priority is "facially silent - as is *the case law* [ ] - as to prospective expenses arising post-confirmation that stem from a contractual arrangement entered into by the debtor-in-possession during bankruptcy." 371 B.R. 210 (E.D. Ken., 2007) (emphasis added). The parties and the courts in that case all agreed it was a matter of first impression. *See, e.g., Id.* at 228. Petitioner has not identified any post-2007 cases involving post-confirmation claims arising from a pre-confirmation contract other than the decisions in *HNRC* and the case at bar, nor is VP Debtors aware of any. In other words, the federal courts have only very rarely been asked to address this issue, strongly suggesting that insurers and debtors have been able to reach mutually satisfactory arrangements without judicial intervention.

It may be justly inferred that in the multitude of bankruptcy cases in which, as Petitioner points out, insurance costs and expenses are a legal prerequisite to the operation of the business of a debtor-in-possession, such costs and expenses must have been adequately addressed through insurance coverages obtained by some other means.

Yet Petitioner argues (Judges Cook and White having taken note, in their "concurring" decision in the Sixth Circuit decision below) that the decision in *HNRC* will "spell an end to the availability of extended payment terms for insurance in the bankruptcy setting," that "'no insurer

will be willing to provide insurance to a bankrupt debtor on extended payment terms,'" and that this will hurt "cash-strapped debtors seeking to reorganize, because insisting on full, up-front payment would create an up-front drain on the debtor's scarce resources . . . ." Pet. 32-33 (in part, quoting Cook, J., concurring). The fact that the record in the instant case does not reflect one shred of evidence supporting Petitioner's position has not deterred Petitioner from making the same argument in each court in which this case has been heard. In point of fact, VP Debtors has obtained anecdotal evidence to the contrary.

The Sixth Circuit decision in *HNRC* was delivered on August 13, 2008, and, since that date, numerous bankruptcies have come and gone, and no other court has had need to address the issue which Petitioner has continued to present in the same "calamitous" context. Debtors have continued to receive debtor-in-possession financing sufficient to "pay in full" their insurance costs and expenses in order to operate their respective businesses in accordance with state laws. Many have continued to post collateral similar to that posted by Petitioner under the Payment Agreement or have entered alternative escrow arrangements within the parameters established by various plans of reorganization or liquidation. *See, e.g.*, *HNRC*, 371 B.R. at 235 (noting that the insurer's claim in that case stemmed from a failure of collateral, and that "there is nothing to suggest that future parties will not continue to negotiate collateralization of deductible risks," and possibly require "even greater collateralization . . . ."). During this time frame, insurers have participated in bankruptcy proceedings for the purpose of ensuring that plans of reorganization and liquidation provide adequate protection for the payment of insurance losses

in full. The only "consequence" the decision below is likely to have is to encourage insurers to be more prudent in the formation and administration of their payment agreements with debtors in bankruptcy.

Petitioner's protests to the contrary notwithstanding, the few courts that have considered the proposition upon which the case presented by Petitioner is predicated have all rejected it. Specifically, the decisions rendered in *HNRC* and in the case at bar in two Bankruptcy Courts, two District Courts, and on no less than three separate occasions in the Sixth Circuit Court of Appeals, have all held that prospective deductible obligations are not entitled to administrative priority.[7] Notwithstanding this less than outstanding lineage, Petitioner requests that this Court yet again address the very same issue which, on a prior occasion, it determined not to address, having denied a Petition for a Writ of Certiorari on the question of whether post-confirmation costs and expenses of an insurer are entitled to administrative expense priority under § 503(b) of the Code. *Zurich Am. Ins. Co. v. Lexington Coal Co.*, 129 S.Ct. 2866 (2009).

Having failed to persuade the courts below that other cases serve as adequate precedent for the proposition that post-confirmation costs and expenses of an insurer are eligible for administrative expense priority under the Code, Petitioner now chooses to "hang its hat" on the somewhat tenuous arguments presented by Judge Cook

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7. *In re HNRC Dissolution Co.*, 343 B.R. 839 (Bankr. E.D.Ky. 2006); *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 371 B.R. 210 (E.D.Ky. 2007), *aff'd*, 536 F.3d 683 (6th Cir. 2008); Pet. 1a-49a.

who, in a "concurring" opinion in the Sixth Circuit decision below, considered herself bound by the prior Sixth Circuit decision in *HNRC*, but, nevertheless, recommended that such decision be reviewed (and, inferentially, overturned), a recommendation thereafter rejected by the sitting judges of the Sixth Circuit. Pet. App. 13a-18a.

Judge Cook unfortunately misconstrued the issues at hand in a decision that became entangled in matters related to the timing of "billing," notwithstanding that "billing" seemed not at all an issue that the courts below felt compelled to address. Judge Cook stated, at various points in her "concurring" opinion, for example, that:

> ...[other courts of appeals'] focus not on when a creditor **bills** the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered.

Pet. App. 15a. (emphasis added);

Petitioner adopts this analysis:

> The decision below, left standing, will have gravely negative consequences for chapter 11 reorganizations. It creates a loophole allowing a debtor in bankruptcy to avoid paying for necessary insurance purchased during the course of its bankruptcy proceeding by the simple expedient of confirming its plan before a creditor submits its **bill** or otherwise liquidates its claim.

Pet. 32 (emphasis added).

There can be no question in the instant case that VP Debtors manipulated either its filing in bankruptcy (the insurance arrangements between Petitioner and VP Debtors were renewed and the Policies issued after VP Debtors filed in bankruptcy, *see, e.g.*, Pet. 7) or the effectuation of Plan confirmation before Petitioner submitted its bill as Petitioner suggests. As reflected in the discussion of the billing requirements under the Payment Agreement in VP Debtors' Statement at the beginning of this Brief, "billing" by Petitioner was undertaken on a monthly basis and payment thereof by VP Debtors was due within a fixed time frame thereafter. As to liquidation of Petitioner's claims, as in the case of any insurer, adjustment and liquidation of claims is invariably under the control of the insurer, rather than the insured. It is truly implausible for anyone at all familiar with insurance company procedures, not to mention the bankruptcy process, to argue that a debtor may time confirmation of its reorganization plan around the anticipated billing of insurance. Interestingly, all this concern has little, if any, significance for the issues at hand. What is of significance is not when bills are rendered, it is when claims are paid. Under the terms of the Payment Agreement, reimbursement follows payment, not the other way around.

Petitioner is mistaken in its leap of logic that this is a matter of exceptional importance which this Court once again needs to address. No Circuit Court, other than the Sixth Circuit Court of Appeals, has expressed the slightest interest in the issue presented since the Supreme Court last denied certiorari in *HNRC*.

Certiorari is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioner,

v.

VP BUILDINGS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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RULE 29.6 STATEMENT

Petitioner's Corporate Disclosure Statement was set forth at page *ii* of its Petition for Writ of Certiorari, and there are no amendments to that Statement.

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REPLY BRIEF FOR PETITIONER

The VP Debtors contend that this case is about (1) "forc[ing]" a debtor to reimburse a creditor for amounts the creditor "may never pay," Op. 6, and (2) "rescu[ing]" the creditor from "its own miscalculations" because, at the time the debtor agreed to pay for its insurance, the creditor did not insist on enough collateral to back up the debtor's payment obligation, *id.* 1, 3-4. These assertions are nonsense. Rejecting them, Circuit Judges Cook and White observed in their concurrence that this case is actually about the VP Debtors receiving a "windfall" by "avoiding the entire post-confirmation portion of the obligation" they owe. Pet. App. 14a. As the concurring judges also determined, the VP Debtors accomplish this by invoking an incorrect standard of law governing the determination of administrative expenses that (1) conflicts with the decisions of other courts of appeals, (2) conflicts with a prior decision of this Court, and (3) portends grave consequences for the administration of chapter 11 cases. *Id.* 15a-18a. For the reasons actually addressed below, the Court should grant certiorari.

The VP Debtors' contention that this case is about inadequate collateral is obviously wrong and irrelevant. It is axiomatic that a creditor takes collateral to secure an obligation of some kind (*i.e.*, the very idea of collateral is that it se-

cures *something*). U.C.C. § 9-102(a)(12) (2010) ("'Collateral' means the property subject to a security interest"); *id.* § 1-201(b)(35) ("'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation."). Conversely, whether a creditor takes collateral or not has nothing to do with the validity of the underlying obligation. For example, if the creditor takes zero collateral to secure an obligation, that does not mean the obligation is invalid. It simply means the obligation is unsecured. Likewise, if the creditor takes collateral, but the value of the collateral is less than the full amount of the obligation owed, that also does not mean the obligation is invalid. It simply means the obligation is inadequately secured. As the Court below properly recognized, this case is not about whether National Union took adequate collateral, but rather whether the VP Debtors had a payment obligation in the first instance that is entitled to administrative priority. Accordingly, the VP Debtor's specious collateralization assertion played no part in the decision below.

Likewise, the VP Debtors' contention that this case is about forcing a debtor to pay amounts the creditor may not have to pay is an equally irrelevant deflection. The unpaid amounts have been liquidated through arbitration, Pet. App. 33a-34a, and the VP Debtors simply wish to avoid paying them. As the court be-

low properly recognized, what matters in this case is the legal basis for the VP Debtors' assertion that they do not have to pay. As noted, the legal basis consists of an erroneous rule of law that conflicts with the decisions of other courts of appeals and a prior decision of this Court with dire consequences for the administration of chapter 11 proceedings. Certiorari is warranted.

I. The Circuits Are Divided Over the Question Presented.

It is undisputed that the VP Debtors were required to obtain workers' compensation insurance. Op. 1. Petitioner, National Union, provided the insurance, and in 2001 (during the post-petition and pre-confirmation reorganization period), the VP Debtors obligated themselves to pay the full cost of that insurance. USDC App. I-A39, II-A173-74, 195-96. The VP Debtors argue (and the Sixth Circuit was bound by its prior precedent in *HNRC*[1] to hold) that the deductible reimbursement portion of the cost of this insurance is not an "actual" expense because the amount ultimately due was not fixed at the time of plan confirmation. Op. 9; Pet. App. 12a. National Union contends, following the standard adopted by other courts of appeals and urged by the concurrence below, that the "actual, neces-

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[1] *Zurich Am. Ins. Co. v. Lexington Coal Co. (In re HNRC Dissolution Co.)*, 536 F.3d 683 (6th Cir. 2008).

sary" administrative expense inquiry must "focus[] not on when a creditor bills the debtor for its services, but on either: 1) when the debtor obligates itself to pay or 2) when the service is rendered," and grant administrative priority to incurred but unliquidated expenses. Pet. App. 15a-16a (Cook, J,, concurring); *see also Potter v. CNA Ins. Cos. (In re MEI Diversified, Inc.)*, 106 F.3d 829, 832 (8th Cir. 1997); *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 993 F.2d 915, 934 (1st Cir. 1993); *cf. Advanced Telecomm. Network, Inc. v. Allen (In re Advanced Telecomm. Network, Inc.)*, 490 F.3d 1325, 1335 (11th Cir. 2007). Certiorari is warranted precisely because the Sixth Circuit's firmly entrenched position conflicts with the decisions of other courts of appeals over the question presented.

Urging a factual characterization that the court below did not accept and that is contrary to the record, the VP Debtors attempt to obscure the analysis by advancing an incorrect understanding of when their obligation was incurred. Op. 18. To clarify, the VP Debtors incurred their obligation to pay for their insurance, including all premium and deductible obligations, when they purchased it in 2001. The Payment Agreement expressly provides that the VP Debtors agreed to pay National Union all of its "Payment Obligation," a defined term that included "Deductible Loss Reimbursements," including "any

portions thereof *not yet due and payable*." USDC App. I-A39, II-A173-74, 195-96 (emphasis added). The fact that the deductible obligations were to be paid over time does not mean they were *incurred* later; it simply means they were *due* later.

The consideration National Union provided in exchange for the administrative claim it seeks was the provision of insurance to the VP Debtors during the post-petition and pre-confirmation period. As part of that consideration, National Union assumed the obligation to advance money on behalf of the VP Debtors. Op. 17 ("[National Union] promised to advance VP Debtors' deductible obligations to injured workers and then to seek reimbursement for those deductibles."). National Union assumed that obligation upon accepting the policy, *i.e.*, post-petition and pre-confirmation. Likewise, the VP Debtors assumed the obligation to reimburse National Union when they signed the policy, also post-petition and pre-confirmation. The obligations of the parties relate to injuries sustained by the VP Debtors' employees only during the post-petition and pre-confirmation period. Notably, if the VP Debtors had not obtained workers' compensation insurance, the VP Debtors would have been liable in tort to pay benefits to employees for their work-related injuries during this period. Further, the injured employees would have been entitled to have their claims paid in full as admin-

istrative expenses. There is no reason why, having paid the claims on the VP Debtors' behalf, National Union is any less entitled to payment as an administrative expense.

It is legally irrelevant that National Union was required to fulfill its obligation over time. Upon agreeing to the Program of insurance, both National Union and the VP Debtors fixed their obligations with respect to each other, as well as the injured employees, and those obligations were simply unliquidated in part at the time of plan confirmation. As Circuit Judges Cook and White acknowledged, under the approach adopted by other circuits, this arrangement would afford National Union administrative expense priority for the Deductible Loss Reimbursement obligations at issue. Pet. App. 15a-16a (Cook, J., concurring); *see also MEI*, 106 F.3d at 832; *Hemingway*, 993 F.2d at 934; *cf. Advanced Telecomm.*, 490 F.3d at 1335. The decision of the court below, bound to follow its own prior precedent, denies administrative expense priority and thereby conflicts with the decisions of other courts of appeals. Nothing in the VP Debtors' Brief in Opposition demonstrates otherwise, and certiorari is warranted.

The conflict with the decisions of other courts of appeals is cemented by the fact that, following *HNRC*, the decision below focused on whether National Union's claim itself (a *cost*)

provided an actual and necessary benefit to the estate. National Union contends, and the concurrence and other courts of appeals have concluded, that the proper approach focuses on whether the *consideration* an estate receives in exchange for its obligation to pay confers a benefit on the estate, not whether the estate's ultimate subsequent *payment* for that consideration does so. *See* Pet. App. 13a-14a, 16a (Cook, J., concurring); *Supplee v. Bethlehem Steel Corp. (In re Bethlehem Steel Corp.)*, 479 F.3d 167, 172 (2d Cir. 2007); *CIT Commc'ns Fin. Corp. v. Midway Airlines Corp. (In re Midway Airlines Corp.)*, 406 F.3d 229, 237 (4th Cir. 2005); *Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988); *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976). At bottom, the VP Debtors' focus on the timing of when payment is due is nothing more than a reformulation of its mistaken focus on whether the *payment* subsequently owed will benefit the bankruptcy estate, rather than the service provided.

The VP Debtors seek to deflect the Petition by focusing on whether National Union could have obtained more collateral, claiming National Union is "ask[ing] the bankruptcy court to re-

write the terms of [their] contract." Op. 9.[2] This argument is absurd. The amount of collateral was not relevant to either the decision below or the decisions of other courts of appeals cited above. That is because, as noted, the relevant question is whether National Union is entitled to an administrative expense claim in the first place, not whether that claim is secured, partially secured, or unsecured. Until *HNRC* announced its novel (and erroneous) rule that the panel below was bound to follow, National Union's administrative expense entitlement was settled. Contrary to the VP Debtors' assertions, the only way for a creditor to protect itself in the Sixth Circuit under the new regime is for the creditor to demand full up-front payment before providing any services. That, of course, would be disastrous for chapter 11 reorganization practice and is patently not the law. Certiorari is warranted.

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[2] In reality, it is the VP Debtors that seek to rewrite the terms of their contract. They seek to excise their express agreement to pay for obligations "not yet due and payable." USDC App. I-A39, II-A173-74, 195-96. Additionally, though they expressly agreed to permit the liquidation of their payment obligation by arbitration, and their obligation has been so liquidated, they now seek to avoid the results of that arbitration and suggest the amounts owed remain speculative. Pet. App. 33a-34a; USDC App. II-A179-80.

II. The Decision Below Conflicts with this Court's Precedent.

This Court has clearly instructed that "the cost of insurance against tort claims arising during an arrangement is an administrative expense payable *in full* . . . before dividends to general creditors." *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968) (emphasis added). The Deductible Loss Reimbursement obligations that the VP Debtors owe to National Union are an integral part of the cost of the state-mandated workers' compensation insurance that National Union provided. USDC App. I-A39, II-A173-74, 195-96. The decision below ignored this Court's clear instruction in *Reading* and instead stripped National Union of administrative expense priority. Pet. App. 12a.

The VP Debtors attempt to distinguish *Reading* on the basis that the damages in that case were "entirely post-petition, not post-confirmation." Op. 20-21. But that is not a distinguishing factor. As explained above, the VP Debtors explicitly agreed to pay the disputed amounts when they purchased the insurance in 2001, USDC App. I-A39, II-A-173-74, 195-96, and the fact that reimbursement payments were not due until later does not change the analysis. The Deductible Loss Reimbursement obligations are part of the cost for the workers' compensation insurance National Union provided, and *Reading* demands that administrative priority

attach to the *full* cost of that insurance. *See Reading*, 391 U.S. at 483.

The VP Debtors further attempt to distinguish *Reading* on the theory that the costs and expenses in that case were somehow more "actual" than in this case. Op. 21. But in *Reading*, the creditor's administrative claim must have been estimated because its claim for $559,730.83 for the loss of the building came only three months after the fire in question, and that time period was obviously too short to know precisely what the costs of reconstructing or replacing the building would be. *Id.* at 473. Moreover, it was one of 147 claims. *Id.* In any event, the Bankruptcy Code itself expressly defines "claim" to include unliquidated and contingent amounts, 11 U.S.C. § 101(5), and bankruptcy courts have ample authority to estimate claims for purposes of allowance and payment. *E.g.*, *id.* § 502(c).

Further undercutting the VP Debtors' contention that National Union's administrative expense claim is somehow speculative, the claim has been reduced through arbitration to a fixed sum that includes all amounts owing and leaves nothing for the bankruptcy court to estimate. Pet. App. 33a-34a. More important, the VP Debtors "actually" (*i.e.*, legally) incurred their payment obligations when they purchased the insurance, and the obligations relate only to injuries that occurred during the post-petition and

pre-confirmation reorganization period. Knowing that some administrative priority claims were unliquidated, the VP Debtors' Plan expressly established a Priority Claims Trust Account to pay unresolved administrative and other priority claims post-confirmation, USDC App. II-A-110, 118, and the accounts have sufficient reserved funds to pay in full National Union's claim. The VP Debtors simply wish to avoid paying National Union and divert this money for other purposes.

The VP Debtors contend that this Court's use of the words "potentially payable in full" in *Reading* was somehow meant to suggest that some of the cost of insurance would not be afforded administrative expense priority – in this case the Deductible Loss Reimbursement obligations. Op. 24-25. The use of the word "potentially" in *Reading*, however, was simply an acknowledgement that in some cases there may not be enough assets in the debtor's bankruptcy estate to pay all administrative claims in full, as happened in *Reading* itself. *Reading*, 391 U.S. at 473, 483. In this case, National Union's administrative expense claim has been liquidated by arbitration to a fixed sum, and the VP Debtors' Plan has set aside sufficient funds to pay that claim. Pet. App. 33a-34a; USDC App. II-A110, 118. Accordingly, that concern is not relevant here.

Continuing to disregard the logic and language of *Reading*, the VP Debtors contend that the full cost of insurance should not be paid as an administrative expense because the parties might have negotiated some kind of full payment treatment in the VP Debtors' Plan. Op. 27. This gesture, however, is entirely empty. No debtor will simply give away full payment in its plan. Either the creditor has a legal entitlement to full payment (and can therefore insist on it), or it does not. *Reading* establishes that National Union does have such an entitlement. In this case, the Plan provides that administrative claims are to be paid in full, and funds have been reserved to cover National Union's claim. Nothing more is required.

The VP Debtors otherwise contend in cryptic fashion that the treatment of National Union's claim might occupy some other status, but the Court in *Reading* rejected that same suggestion. *See Reading*, 391 U.S. at 479. Once again, the Deductible Loss Reimbursement obligations for which National Union seeks administrative priority are an integral part of the cost of the insurance it extended to the VP Debtors during their reorganization. The direct conflict between the decision below and *Reading* calls for certiorari review.

III. The Question Presented Is of Exceptional Importance, and the VP Debtors' Focus on Available Collateral Is a Classic Red Herring.

The VP Debtors contend that the Petition raises only a narrow issue of limited importance. In reality, the VP Debtors are concerned only with their own circumstances and ignore the consequences of the decision below on the availability of the form of insurance in question. The concurrence below properly recognized the broader implications and acknowledged that, by denying National Union administrative expense status, the court's decision would "likely spell an end to the availability of extended payment terms for insurance in the bankruptcy setting." Pet. App. 18a.

Once again, the VP Debtors' solution is for an insurer to take more collateral. As noted, however, that position is nonsensical. It is also contrary to the purpose of administrative priority. As acknowledged in *Reading* and subsequent cases, the overriding purpose of administrative priority is to ensure successful reorganizations. *Reading*, 391 U.S. at 475 ("the words 'preserving the estate' include the larger objective . . . of operating the debtor's business with a view to rehabilitating it."); *NLRB v. Bildisco*, 465 U.S. 513, 527-28 (1984). The VP Debtors' proposed solution is contrary to this purpose be-

cause taking more collateral would simply add additional cost.

Absent this Court's intervention, the effect of the decision below is sure to be felt in many business reorganization proceedings due to the undisputed requirement that corporate debtors seeking to reorganize must obtain workers' compensation insurance. Because payments made to injured employees under workers' compensation insurance plans are intended to be a form of wage substitute, they are designed to and generally do extend into the future – well beyond the duration of the typical bankruptcy case. Under such an arrangement, insurers have little control over when bills will be submitted, but debtors are free to (and the VP Debtors did in this case) confirm their plans before payments to injured employees are concluded. Ironically, the VP Debtors inappropriately assert that the timing of subsequent billing is controlled by National Union. Op. 32-33. In reality, however, the timing of bills submitted is dictated by when payments are made to the injured employees, and this problem will repeat itself for all insurers that offer insurance of this kind within the Sixth Circuit unless the decision below is corrected.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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No. 10-711

IN THE

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Petitioner,

v.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF ZURICH AMERICAN INSURANCE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICUS CURIAE

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MOTION OF ZURICH AMERICAN INSURANCE COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b) of the rules of this Court, Zurich American Insurance Company ("Zurich") respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for a writ of certiorari. Pursuant to Rule 37.2(a), amicus notified counsel of record for all parties ten days before this brief's due date of its intention to file the brief and requested their consent to the filing. Petitioner has consented, and petitioner's letter of consent has been submitted to the Clerk of the Court. Respondent has not yet responded to Zurich's request.

This case presents a question of substantial importance to the administration of the Bankruptcy Code, and of great practical import to insurers and debtors alike: whether all costs incurred by a debtor to obtain insurance during its reorganization, including deductibles that may not become due until after plan confirmation, are administrative expenses entitled to priority payment in bankruptcy.

The Bankruptcy Code provides that "the actual, necessary costs and expenses of preserving the estate"—including the expenses necessary to keep the debtor's business in operation while it attempts to reorganize—are known as "administrative expenses" and granted priority over most pre-bankruptcy claims. 11 U.S.C. § 503(b)(1)(A); *id.* § 507(a)(2). Such treatment is necessary in order to encourage insurers and providers of other essential goods and services to do business with entities in bankruptcy and for those entities to have any realistic chance of reorganizing.

This Court has made clear that the cost of insurance necessary for a debtor to operate during bankruptcy is a quintessential administrative expense. *See Reading Co.* v. *Brown*, 391 U.S. 471, 483 (1968). Yet, in the decision below, the Sixth Circuit held that an insurer that provides a debtor with insurance the debtor needs to operate during bankruptcy is *not* entitled to administrative priority for the entire cost of the insurance. Specifically, it addressed the common situation in which an insurer provides a debtor with workers' compensation insurance under which the insurer pays claims as they arise and the debtor thereafter pays the insurer a deductible for each claim. The workers' compensation insurance was required by state law for the debtor to continue its business, and the deductibles were a very substantial part of the payment the debtor

agreed to make for the insurance coverage. The Sixth Circuit nonetheless held that the insurer could not obtain administrative priority for deductibles that came due after the debtor confirmed its plan of reorganization.

In so holding, the Sixth Circuit followed its prior decision in *Zurich American Insurance Co.* v. *Lexington Coal Co.* (*In re HNRC Dissolution Co.*), 536 F.3d 683 (6th Cir. 2008) (per curiam). As in *HNRC*, the court reasoned, in essence, that because the deductibles would not be liquidated until after plan confirmation, they were not "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A); *see HNRC*, 536 F.3d at 683-684. While the panel held that it was bound by *HNRC*, two of the three members of the panel urged the Sixth Circuit to decide the issue en banc, recognizing that *HNRC*'s reasoning is flawed, conflicts with the decisions of other courts, and poses substantial practical obstacles to debtors who need insurance to reorganize. Pet. App. 13a-18a.

As an insurer that issues workers' compensation and other insurance policies to companies that may find themselves in bankruptcy, Zurich has a strong interest in having this Court resolve the important and recurring issue presented by the petition. As a result of the Sixth Circuit's decision in *HNRC*, now reaffirmed by the decision below, Zurich has been required to revise its business practices with regard to issuing insurance to companies that are in bankruptcy or likely to enter bankruptcy. If this Court were to grant the petition and reverse the decision below, adopting a rule under which unliquidated deductibles are properly treated as administrative expenses—as Zurich believes the Bankruptcy Code requires—insurers will again be able to make such necessary insurance available to debtors on

affordable terms, thus benefiting insurers and debtors alike, and furthering the Bankruptcy Code's purpose of encouraging reorganization.

Accordingly, Zurich respectfully requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted.

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JANUARY 2011

CORPORATE DISCLOSURE STATEMENT

Zurich American Insurance Company is a wholly owned subsidiary of Zurich Holding Company of America, Inc., a Delaware corporation. Zurich Holding Company of America, Inc. is 99.8711% owned directly by Zurich Insurance Company Ltd, a Swiss corporation, with the remaining shares indirectly owned by Zurich Insurance Company Ltd. Zurich Insurance Company Ltd is directly owned by Zurich Financial Services Ltd, a Swiss corporation. Zurich Financial Services Ltd is the only publicly traded parent company, with a listing on the Swiss stock exchange, and a further trading of American Depositary Receipts.

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IN THE

Supreme Court of the United States

No. 10-711

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Petitioner,

v.

VP BUILDINGS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF ZURICH AMERICAN INSURANCE COMPANY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Amicus curiae Zurich American Insurance Company ("Zurich") respectfully submits this brief in support of the petition for a writ of certiorari.[1]

[1] Pursuant to Rule 37.2(a), Zurich notified counsel of record for all parties ten days before this brief's due date of its intention to file the brief. Petitioner has consented to the filing of the brief and a letter of consent has been submitted to the Clerk of the Court. Respondent has not yet responded to Zurich's request. Pursuant to Rule 37.2(b), therefore, Zurich has prepared and submits with this brief a motion for leave to file the brief. No counsel for a party authored this brief in whole or in part, and no person, other than

INTEREST OF AMICUS CURIAE

The Bankruptcy Code provides, and this Court has long recognized, that those who do business with a debtor in bankruptcy are generally entitled to be paid before the debtor's pre-bankruptcy creditors. *See generally Reading Co.* v. *Brown*, 391 U.S. 471 (1968). Specifically, "the actual, necessary costs and expenses of preserving the estate"—including the expenses necessary to keep the debtor's business in operation while it attempts to reorganize—are known as "administrative expenses" and granted priority over most pre-bankruptcy claims. 11 U.S.C. § 503(b)(1)(A); *id.* § 507(a)(2). Congress chose to grant administrative expenses priority "to provide an incentive for creditors to continue doing business with the debtor and an incentive for others to engage in business transactions with the debtor." 4 *Collier on Bankruptcy* ¶ 503.06[2] (16th ed. 2010). Absent such priority treatment, a debtor would be unlikely to obtain credit except on the most onerous terms, and its prospects of continuing its business and successfully reorganizing would be severely limited.

As this Court has made clear, the cost of insurance necessary for a debtor to operate during bankruptcy is a quintessential administrative expense. *See Reading*, 391 U.S. at 483. Yet, in the decision below, the Sixth Circuit held that an insurer that provides a debtor with insurance the debtor needs to operate during bankruptcy is *not* entitled to administrative priority for the entire cost of the insurance. Specifically, it addressed the common situation in which an insurer provides a debtor with workers' compensation insurance under which the in-

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amicus and its counsel, made any monetary contribution to the preparation or submission of this brief.

surer pays claims as they arise and the debtor thereafter pays the insurer a deductible for each claim. The workers' compensation insurance was required by state law for the debtor to continue its business, and the deductibles were a very substantial part of the payment the debtor agreed to make for the insurance coverage. The Sixth Circuit nonetheless held that the insurer could not obtain administrative priority for deductibles that came due after the debtor confirmed its plan of reorganization—even though the deductibles were exclusively for claims that arose prior to confirmation of the plan.

In so holding, the Sixth Circuit followed its prior decision in *Zurich American Insurance Co.* v. *Lexington Coal Co.* (*In re HNRC Dissolution Co.*), 536 F.3d 683 (6th Cir. 2008) (per curiam). As in *HNRC*, the court reasoned, in essence, that because the deductibles would not be liquidated until after plan confirmation, they were not "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A); *see HNRC*, 536 F.3d at 683-684.

As an insurer that issues workers' compensation and other insurance policies to companies that may find themselves in bankruptcy, Zurich has a strong interest in having this Court resolve the important and recurring issue presented by the petition. As a result of the Sixth Circuit's decision in *HNRC*, now reaffirmed by the decision below, Zurich has been required to revise its business practices with regard to issuing insurance to companies that are in bankruptcy or likely to enter bankruptcy. If this Court were to grant the petition and reverse the decision below, adopting a rule under which unliquidated deductibles are properly treated as administrative expenses—as Zurich believes the Bankruptcy Code requires—insurers will again be able to make such necessary insurance available to debtors on affordable

terms, thus benefiting insurers and debtors alike, and furthering the Bankruptcy Code's purpose of encouraging reorganization.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S OVERLY NARROW INTERPRETATION OF ADMINISTRATIVE EXPENSES CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND WRONGLY DECIDES AN ISSUE OF SUBSTANTIAL IMPORTANCE TO DEBTORS AND INSURERS

This Court should grant certiorari to resolve the confusion created by the Sixth Circuit regarding a question of exceptional and wide-ranging significance: the definition of "administrative expense" in bankruptcy. Administrative expenses are obligations incurred by the debtor or bankruptcy trustee during the bankruptcy case. They include, for example, loans, leases, supply agreements, or other contracts enabling the debtor to continue its business while it is attempting to reorganize; wages paid by the business while in bankruptcy; and tort or environmental liabilities incurred through the debtor's operations while it is in bankruptcy. *See generally Reading Co.* v. *Brown*, 391 U.S. 471 (1968). As defined by the Bankruptcy Code, administrative expenses include all "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A).

The Bankruptcy Code provides that administrative expenses receive priority over the claims of other creditors. 11 U.S.C. § 507(a). Priority status is important to a creditor's recovery because the claims against a bankruptcy estate typically far outstrip the value of the debtor's assets. Creditors with high-priority claims may be paid in full, whereas those lower in the hierarchy will likely recover only pennies on the dollar, or nothing at all. As noted above, Congress chose to grant administrative-

expense claims priority "to provide an incentive for creditors to continue doing business with the debtor and an incentive for others to engage in business transactions with the debtor." 4 *Collier on Bankruptcy* ¶ 503.06[2] (16th ed. 2010). Lenders, suppliers, and others considering dealing with a debtor will be understandably wary that credit they extend might not be repaid. This concern is allayed if, in the event "the debtor fails to rehabilitate itself and winds up in liquidation, they can move to the front of the distributive line, ahead of the debtor's pre-bankruptcy creditors." *Nostas Assocs.* v. *Costich (In re Klein Sleep Prods., Inc.)*, 78 F.3d 18, 20 (2d Cir. 1996). Without that assurance, a debtor's ability to obtain credit—or, as in this case, affordable insurance with a deductible arrangement—and thus to reorganize and emerge from bankruptcy as a going concern would be severely compromised.

The decision below, together with the Sixth Circuit's prior decision in *HNRC*, marks a radical departure from the otherwise settled understanding of § 503(b)(1)(A), under which a creditor who provides services to a debtor during the bankruptcy case is entitled to administrative priority for *all* payments due to it in return for those services.

There can be no question that the insurers' claims for deductibles in this case and in *HNRC* arose from a transaction with the bankruptcy estate and directly and substantially benefited the estate. Indeed, the debtors were required by state law to carry workers' compensation insurance in order to operate their businesses during the bankruptcy case. *See Zurich Am. Co.* v. *Lexington Coal Co. (In re HNRC Dissolution Co.)*, 371 B.R. 210, 217 (E.D. Ky. 2007) ("[T]he insurance coverage provided by the Zurich Policies was critical to [Horizon's] operations. Without the insurance provided by Zurich, [Horizon]

would have been unable to operate [its] business as a going concern ... during the pendency of the bankruptcy."); Pet. App. 7a ("The parties agree that the provision of insurance benefitted the estate[.]"). The insurance contracts the debtors entered into obligated them to reimburse their insurers for the deductibles the insurers advanced. And a debtor's obligations under a contract necessary to operate its business are *ipso facto* actual, necessary costs of preserving the estate.

Nonetheless, the Sixth Circuit below held that the debtor's obligation to pay deductibles was not an "actual, necessary cost[] and expense[] of preserving the estate" under § 503(b)(1)(A). The court reasoned that the deductibles were not "actual" expenses of preserving the estate because the debtor would not become obligated to pay them until after the bankruptcy case had ended and because their amount could not be ascertained with certainty until that time. Pet App. 10a. Similarly, the Sixth Circuit reasoned in *HNRC* (adopting the reasoning of the district court) that "the payment of the deductibles, when and if they should arise ... does not provide a direct and substantial benefit to, nor act to preserve, a bankruptcy estate where there is no longer an estate to benefit." 371 B.R. at 228.

That reasoning suffers from a fundamental flaw: It asks whether *payment of the deductibles* would preserve or benefit the estate, rather than asking whether the *insurance* the debtor received in return for agreeing to pay premiums and deductibles (in addition to the cash-flow benefit of the deductible arrangement itself) preserved or benefited the estate. As the concurring judge on the Sixth Circuit panel explained, "[F]ramed this way, there can be just one answer—a *cost* incurred by a business (let alone a bankrupt one) by definition provides no benefits and, arguably, does not become actual or necessary until

the debtor receives the bill, which may not occur until after plan confirmation." Pet. App. 13a-14a. That mode of analysis cannot be reconciled with this Court's controlling decisions or with common sense. Rather, "[o]nly by analyzing the cost's purpose—assessing the *services* provided in exchange—can courts determine whether the expense meets § 503(b)'s requirements." *Id.* at 14a.

In *Reading*, this Court construed the predecessor to § 503(b)(1)(A) under the Bankruptcy Act of 1898, which similarly granted administrative priority to "the actual and necessary costs and expenses of preserving the estate," to include tort claims against a debtor arising during its bankruptcy. 391 U.S. at 475. The Court reasoned that "'actual and necessary costs' should include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible." *Id.* at 483. Accordingly, because the tort claim was the result of the debtor's operation of its business during the bankruptcy, the claim was entitled to administrative priority.

Reading thus expressly rejected one of the key premises underlying the Sixth Circuit's analysis: the notion that a *payment* must benefit the estate to be entitled to administrative priority. Instead, the proper inquiry is whether the debt was incurred through the operation of the debtor's business, as a result of its efforts to continue the business as a going concern (either for reorganization or sale to the highest bidder). That is unquestionably true here: The insurance coverage provided permitted the debtors to continue operating as they sought to reorganize, to the benefit of the estates and their creditors—even if the reorganization attempt ultimately failed. And the rule recognized in *Reading* makes sense. The payment of a debt never benefits the estate; the benefit that

the estate receives is the goods or services that it obtains in exchange for its obligation to pay for them.

In contrast to the Sixth Circuit, other courts of appeals have recognized that a claim for payment need not mature or be liquidated prior to plan confirmation to be an administrative expense, as long as the payment is in return for a benefit conferred on the bankruptcy estate. *See, e.g.*, *Devan* v. *Simon DeBartolo Group, L.P. (In re Merry-Go-Round Enters., Inc.)*, 180 F.3d 149, 157-158 (4th Cir. 1999) (future rent owed by the debtor under a lease entered into during bankruptcy was an administrative expense even though it did not become due until after failure of the reorganization); *Klein Sleep Prods.*, 78 F.3d at 22-26 (same; explaining that "assumption of an unexpired lease transforms *all* liability under the lease ... into administrative expenses" and that a contrary holding "would mean that any post-bankruptcy contract, entered into for the benefit of a bankrupt's estate, would cease to be entitled to priority the moment the deal turned sour," contravening the purpose of the administrative-expense provisions); *Juniper Dev. Group* v. *Kahn (In re Hemingway Transp. Inc.)*, 993 F.2d 915, 934 (1st Cir. 1993) (if creditor held a valid claim for clean-up costs under CERCLA, "past and future [clean-up] costs should be estimated and allowed as administrative expenses entitled to priority" (footnote omitted)); *Carter-Wallace, Inc.* v. *Davis-Edwards Pharmacal Corp.*, 443 F.2d 867, 874 (2d Cir. 1971) (unliquidated patent infringement claim arising from the debtor's post-petition activity was entitled to administrative priority). Equally fundamentally, as the concurrence below recognized and the petition for certiorari explains, other courts of appeals are in accord in focusing on what the estate *obtains*—be it goods, services, or simply the ability to operate the debtor's business—not what the estate *pays*, in deter-

mining whether a claim is an "actual, necessary cost of preserving the estate" entitled to administrative priority. Pet. 22-24; Pet. App. 13a-16a.

The contrary rule applied in the Sixth Circuit is an unduly narrow interpretation of the Bankruptcy Code's administrative-expense provisions. If left uncorrected, it will significantly impair financially distressed companies' ability to reorganize. Reorganization depends critically on the willingness of lenders, suppliers, landlords, insurers, and other parties to provide the debtor with needed credit, goods, and services during the bankruptcy. Unless these parties are willing to extend credit or provide goods and services to the debtor on a post-petition basis, debtors will be unable to preserve or rehabilitate their businesses. The administrative-expense provisions of the Code assure such parties that if they do business with a company in bankruptcy, they will be paid amounts due to them in full. The Sixth Circuit's reasoning undermines that assurance, imposing on parties contracting with debtors the risk that, if the debtor's reorganization efforts fail, they will be left unpaid. Such uncertainty will seriously threaten debtors' ability to obtain the goods and services they need to reorganize.

This risk is particularly acute for debtors that require insurance covering claims likely to arise while they attempt to reorganize. Insurers will be unwilling to offer debtors the type of insurance policies they are most likely to be able to afford—policies requiring the payment of deductibles, which reduce premiums and offer a substantial cash-flow benefit to cash-strapped debtors. *Cf. Eastern Air Lines* v. *Insurance Co. of State of Penn. (In re Ionosphere Clubs, Inc.)*, 85 F.3d 992, 994 (2d Cir. 1996) (noting that no insurance company was willing to offer guaranteed-cost workers' compensation coverage to financially distressed airline). As this Court explained in

Reading, "[i]t is of course obvious that proper insurance premiums must be given priority, else insurance could not be obtained," 391 U.S. at 483, and insurance is necessary to every debtor's business. Without affordable insurance, many Chapter 11 debtors will have no opportunity to attempt reorganization and will be forced to liquidate.

II. The Sixth Circuit's Decision Splits With Other Circuits On The Important And Recurring Question Of The Meaning Of "Claim" In Bankruptcy

The Sixth Circuit's reasoning in *HNRC*, adopted by the decision below, rested in significant part on the court's conclusion that the insurer's claim for reimbursement for deductibles under its policies would not "arise" until the debtor's obligation to pay the deductibles accrued as a matter of state contract law. The court reasoned that the "deductible obligations do not even exist" until the workers' compensation claims are presented. *HNRC*, 371 B.R. at 228. The underlying premise of this reasoning—that a "claim" "does not even exist" for purposes of bankruptcy law until a state-law right to payment has ripened—cannot be squared with either the language of the Bankruptcy Code or the reasoning of every other court of appeals to address the issue.

One of the most important and fundamental questions in bankruptcy law is the question when a bankruptcy "claim" arises. The answer to that question plays a crucial role in a claimant's recovery. If a claim arises before the filing of the bankruptcy petition, it receives no special priority, unless it falls into one of the narrow categories set out in § 507. If such a pre-bankruptcy claim is unsecured, it will likely receive only pennies on the dollar, if it is paid at all. If, on the other hand, a claim arises during the bankruptcy, it will generally be an ad-

ministrative expense entitled to priority over the claims of most pre-bankruptcy creditors. Such administrative-expense claimants will typically receive a far higher proportion of the amount they are owed. Finally, if a claim does not arise until after the bankruptcy case is concluded, it is not entitled to payment in the bankruptcy at all (nor is it discharged in bankruptcy). In that case, if the debtor succeeds in reorganizing, the claim may be asserted against the reorganized entity. But in the common event that the debtor liquidates—as occurred here—the claimant will almost certainly recover nothing: "[I]ts right to recover exists in theory but is not enforceable in practice." *Reading*, 391 U.S. at 478.

The Bankruptcy Code defines a "claim" as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). As Congress explained when the Code was enacted, "[b]y this broadest possible definition," the Code "contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." H.R. Rep. No. 95-595, at 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

Notwithstanding the Bankruptcy Code's very broad definition of a "claim," for many years the courts of appeals were sharply divided on the question whether a "claim" exists, as a matter of bankruptcy law, at a time when the acts giving rise to liability have occurred, but when the claimant has not yet suffered the type of injury that would entitle it to sue under non-bankruptcy law.

In *Avellino & Bienes* v. *M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984), the Third Circuit employed the same analysis as the Sixth Circuit be-

low, holding that a "claim" under the Bankruptcy Code does not arise until the right to payment accrues as a matter of non-bankruptcy law. In *Frenville*, a group of banks sued an accounting firm that the debtors had engaged as an auditor for negligently preparing the debtors' financial statements. *See id.* at 333. The accounting firm wished to obtain indemnification or contribution from the debtors via a third-party complaint, which was permissible under the automatic-stay provision, 11 U.S.C. § 362(a)(1), only if the firm's claim arose before the filing of the bankruptcy petition. *See* 744 F.2d at 333-334. The court acknowledged that "the debtor[s'] acts which form the basis of [the] suit"—preparation of the financial statements—"occurred pre-petition," but nevertheless, looking to New York law, held that the accounting firm's claim for contribution or indemnification from the debtor arose only post-petition, once it had been sued by the banks. *Id.* at 334, 337 ("[T]he threshold question of when a right to payment arises ... 'is to be determined by reference to state law.'").

Every other court of appeals to consider this issue has rejected *Frenville*, noting the breadth of the definition of "claim" under the Bankruptcy Code and the undesirable consequences that follow from an overly restrictive reading of that definition. *See United States* v. *LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997 (2d Cir. 1991) (EPA had a contingent "claim" in bankruptcy for all future clean-up costs arising from the debtor's pre-bankruptcy discharge of hazardous waste); *Grady* v. *A.H. Robins Co.*, 839 F.2d 198, 201 (4th Cir. 1988) (expressly rejecting the reasoning of *Frenville* and concluding that a claimant who had a Dalkon Shield inserted before the bankruptcy petition had a "claim" for purposes of the automatic-stay provisions even if injury would not manifest itself until post-petition), *aff'g In re A.H. Robins Co.*,

63 B.R. 986, 993 (Bankr. E.D. Va. 1986) (holding that a claim arises at the "time when the acts giving rise to the alleged liability were performed" (internal quotation marks omitted)); *Butler* v. *NationsBank, N.A.*, 58 F.3d 1022, 1029 (4th Cir. 1995) (expressly refusing to follow *Frenville*, and concluding that a bank "had a claim as soon as [the debtor] deposited the fraudulently endorsed check," even though recovery "was contingent upon the receipt of notice of the forgery"); *California Dep't of Health Servs.* v. *Jensen (In re Jensen)*, 995 F.2d 925, 930 (9th Cir. 1993) ("all future ... cost[s] based on pre-petition conduct that can be fairly contemplated by the parties at the time of [the] bankruptcy" are "claims" under the Bankruptcy Code (internal quotation marks omitted)); *Watson* v. *Parker (In re Parker)*, 313 F.3d 1267, 1269-1270 (10th Cir. 2002) (holding that a malpractice claim arises on the date the underlying conduct occurred, not on the date a cause of action accrued under state law); *Epstein* v. *Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp. (In re Piper Aircraft Corp.)*, 58 F.3d 1573, 1577 (11th Cir. 1995) ("The debtor's prepetition conduct gives rise to a claim to be administered in a case only if there is a relationship established before confirmation between an identifiable claimant ... and [the debtor's] prepetition conduct.").

Significantly, the en banc Third Circuit recently rejected the reasoning of *Frenville* (and implicitly that of the Sixth Circuit), holding that, in the tort context, a "claim" arises under bankruptcy law when the claimant is exposed to a product or conduct that later causes injury. The en banc court observed that "there seems to be something approaching a consensus among the courts ... that "a 'claim' arises when an individual is exposed prepetition to a product or other conduct giving rise to an injury which underlies a 'right to payment' under the

Bankruptcy Code." *Jeld-Wen, Inc.* v. *Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 125 (3d Cir. 2010) (en banc). *Grossman's* recognized that the "accrual test in *Frenville*," like the reasoning of the Sixth Circuit, "does not account for the fact that a 'claim' can exist under the Code before a right to payment exists under state law." *Id.* at 121. And it concluded that *Frenville* "imposes too narrow an interpretation of a 'claim' under the Bankruptcy Code. Accordingly, the *Frenville* accrual test should be and now is overruled." *Id.*

As the Third Circuit noted in *Grossman's*, the courts are "approaching a consensus" on this issue of bankruptcy law. 607 F.3d at 125. And that consensus is directly contrary to the holding of the Sixth Circuit below that an insurer cannot have a "claim" before its right to payment would accrue under non-bankruptcy law. In reasoning that closely tracks *Frenville*'s rejected "accrual" test, the Sixth Circuit concluded that "until [an insurer] has made a payment" on a claim and thus is permitted to "seek[] reimbursement from the insured" under non-bankruptcy law, its claim is not "actual" and therefore is not entitled to administrative expense priority. Pet. App. 10a.

The Third Circuit correctly recognized that this reasoning was out of step with the emerging consensus among the courts of appeals, observing that its *Frenville* decision was "one of the most criticized and least followed precedents under the current Bankruptcy Code." *Grossman's*, 607 F.3d at 120 (internal quotation marks omitted). The Third Circuit therefore went en banc to reconsider *Frenville* and bring its precedent into line with the overwhelming majority view. But the Sixth Circuit, notwithstanding the strong suggestion by two of the three members of the panel that the court rehear this case en banc (Pet. App. 13a-18a), has declined to do so.

Accordingly, only this Court can bring uniformity to the courts of appeals' treatment of this fundamental question of bankruptcy law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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